

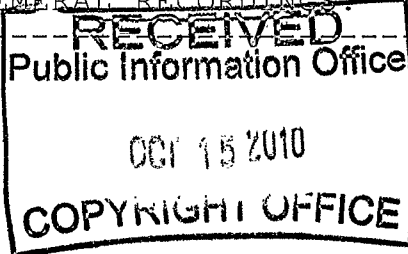
Capital Reporting Company
Copy Right Royalty Board - Closing Arguments - 09-30-2010

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BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES
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 ORIGINAL

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IN THE MATTER OF: : Docket No: 2009-1
: CRB Webcasting III
DIGITAL PERFORMANCE RIGHT in :
SOUND RECORDINGS and : REBUTTAL PHASE
EPHEMERAL RECORDINGS. : Closing Arguments
-----: (Pages 497 - 679)



Washington, D.C.

Thursday, September 30, 2010

The following pages constitute the
Rebuttal Phase in the above-captioned matter at the
Library of Congress, Madison Building, 101
Independence Avenue, Southeast, Washington, D.C.,
before Vicky Reiner, RMR, CRR, of Capital
Reporting Company, a Notary Public in and for the
District of Columbia, beginning at approximately
9:44 a.m. when were present on behalf of the
respective parties:

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1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Good morning, everyone.
3 Welcome back.

4 MR. MALONE: Yes, sir, thank you. I do have
5 a preliminary matter, Your Honor.

6 CHIEF JUDGE SLEDGE: The interim between the
7 last time we were together hadn't produced all the
8 settlements that we fully expected you to present to
9 us. But other than that, we've gotten a lot of
10 information from you.

11 We are here for closing arguments after the
12 record has been closed, to hear any emphasis that you
13 wish to add to matters that you have already presented
14 to us. We have gotten and accepted your time periods
15 for the closing arguments. You're very generous in
16 the time that has been divided. And I wonder why you
17 feel like that you will need that kind of time just to
18 emphasize the matters. Maybe you're expecting a good
19 period of time of dialogue. And that's always a
20 possibility that you can't control. So absent a
21 dialogue, maybe there would not be near the need for
22 the time that you have allocated.

1 We'll see how you manage that to determine
2 whether we will be able to finish in one seating or
3 whether we will need to have any interruption for
4 midday. But perhaps you will not use enough of the
5 allocated time that we'll be able to conclude the
6 arguments this morning without an interruption.

7 Mr. Malone.

8 MR. MALONE: Good morning, Your Honor.

9 CHIEF JUDGE SLEDGE: Good morning.

10 MR. MALONE: I would like to introduce to
11 the bench my associate Matthew Schettenhelm.

12 CHIEF JUDGE SLEDGE: Welcome,
13 Mr. Schettenhelm.

14 MR. MALONE: A name you've seen various
15 places. Here he is in person.

16 CHIEF JUDGE SLEDGE: Thank you. All right.
17 Are there any other announcements before we begin the
18 arguments?

19 Well, thank you. Mr. Handzo.

20 CLOSING ARGUMENTS ON BEHALF OF SOUNDEXCHANGE, INC.

21 MR. HANDZO: Thank you, Your Honor. I say
22 having the podium on this side of the courtroom is

1 going to throw me off. I'll do my best.

2 CHIEF JUDGE SLEDGE: That's right. We
3 wanted to see how flexible you are. Well, with our
4 renting space from Copyright, we never know what
5 conditions things will be when we find them. This is
6 what we found today.

7 MR. HANDZO: May it please the Court, David
8 Handzo on behalf of SoundExchange. I'm going to start
9 in I think the obvious place by talking about the
10 evidence supporting the commercial rates. Then I'll
11 address, I think, much more briefly the noncommercial
12 rates, ephemerals. And I'll certainly try and leave
13 time at the end to answer questions from Judge Roberts
14 about terms.

15 JUDGE ROBERTS: I might surprise you today.
16 I may ask nothing.

17 MR. HANDZO: That wouldn't disappoint me,
18 Judge Roberts.

19 JUDGE ROBERTS: I would imagine not.

20 MR. HANDZO: And I do expect not to use all
21 of my time. But I would ask that, to the extent that
22 I don't, if there is some rebuttal within those time

1 limits, the Court would permit me to do that.

2 With respect to the commercial rates, the
3 parties have offered the courts three benchmarks or
4 models that provide a basis to set the rates here.
5 There's the interactive services benchmark testified
6 to by Dr. Pelcovits, the NAB and commercial webcaster
7 settlements negotiated under the Webcaster Settlement
8 Act, and the modeling approach offered by Dr. Fratrik
9 on behalf of Live365.

10 Now, just at a high level, I would submit
11 that Dr. Fratrik's model is one that can be rejected
12 out of hand. With all due respect to Dr. Fratrik,
13 it's really kind of a ramshackle affair. He uses cost
14 data and subscription revenues from Live on the
15 assumption that it's typical, without any showing that
16 it really is. But he then abandons his assumption
17 that Live is typical and gets his ad revenue data from
18 an industry-wide survey by ZenithOptimedia.

19 But then he takes the number of
20 industry-wide plays from a different source,
21 AccuStream, and he cobbles that all together.

22 And Dr. Fratrik tops it off by assuming that

1 webcasters will exit the market unless they can earn a
2 20 percent operating margin, a number which he gets
3 from terrestrial radio markets, although he concedes
4 that terrestrial radio has higher barriers to entry,
5 higher capital costs which would ordinarily result in
6 them earning a higher operating return than webcasters
7 do.

8 Just as problematic, and actually probably
9 more problematic than all of that is the fact that
10 Dr. Fratrik excluded from his calculations something
11 like 40 percent of the revenue that Live earns from
12 what it calls its broadcaster business. So at the end
13 of the day, I would submit that Dr. Fratrik's model
14 can't be relied on and can't be fixed.

15 SoundExchange has offered two things.
16 First, the WSA agreements with the NAB and with
17 commercial webcasters.

18 JUDGE WISNIEWSKI: Forgive me, why should we
19 care about that 40 percent that's been excluded?

20 MR. HANDZO: You should care about it
21 because it is an integral part of Live's business.
22 And because, as Live's own expert, Dr. Salinger,

1 testified, if you were setting rates for Live, to the
2 extent that Live earns those what they call
3 broadcaster revenues, in part because of their ability
4 to offer webcasting services, Live would naturally
5 consider the value of those broadcaster revenues when
6 they decide what royalty they would be willing to pay.

7 So Dr. Ordoover, Dr. Salinger and
8 Dr. Pelcovits actually all agreed that, what they try
9 and separate out as their broadcaster business, as
10 opposed to their webcaster business, are really all
11 part of the same business. It's one unitary whole.
12 Each one influences the other. So what you will pay
13 for an input to one is going to be determined in part
14 by the revenues that you earn from the whole. And so
15 it does need to be considered.

16 CHIEF JUDGE SLEDGE: Mr. Handzo, Live made
17 such a concerted effort of intertwining their
18 descriptions of their services and confusing the
19 descriptions of their services. I want to make sure I
20 understand what your -- how you're using what they did
21 to confuse us. When you say broadcasting, Live ended
22 up by saying that their broadcasting services was

1 their webcasting service. Is that what you're
2 meaning?

3 MR. HANDZO: Yes. I mean, unfortunately,
4 Judge, I can't give you the definition. It's their
5 definition. I don't think it makes any sense. I
6 think the reason they've never been able to define for
7 you a distinction between broadcasting and webcasting
8 is because there isn't one. That's my point. It's
9 all one thing.

10 And so I'm necessarily using those terms
11 because they did. But I don't subscribe for a second
12 to the notion that these are actually separate
13 businesses that you can separate. They're not at all.
14 So there isn't a definition that you can come up with
15 that adequately describes one versus the other because
16 they're the same thing.

17 Now, with respect to the analysis that
18 SoundExchange offered, one thing offered by
19 Dr. Pelcovits was the WSA agreements with the NAB and
20 commercial webcasters originally negotiated with
21 Sirius/XM.

22 And the rates in those agreements apply to

1 the precise rights for which this Court is now setting
2 rates for the same rate period. And they were
3 voluntarily negotiated on behalf of webcasters
4 representing a substantial part of this market. And I
5 would submit that that makes those compelling evidence
6 that the Court should consider.

7 And the third analysis that was offered in
8 this case, again by Dr. Pelcovits, is the interactive
9 benchmark. Benchmarking analysis of course is widely
10 accepted and has been utilized by this court in its
11 decisions in the past. There's really no dispute in
12 this case that if you're going to use a benchmarking
13 approach, the sort of on-demand interactive market is
14 the appropriate benchmark market to look at. No one
15 has disputed that.

16 So I would submit that Dr. Pelcovits's
17 benchmark analysis, too, is compelling evidence.

18 Now, I want to dive into a little deeper
19 detail with all of those. But before I do that, I
20 want to take a minute to talk about SoundExchange's
21 rate proposal.

22 SoundExchange proposes rates that fall in

1 between the rates in the WSA agreements and the rates
2 derived from the interactive services benchmark,
3 albeit closer to the former. Those start at .0021
4 dollars per play in 2011 and step up to .0029 dollars
5 per play in 2015.

6 And that increase over time is similar to
7 what you see in the WSA agreement. So there is
8 economic evidence to support it.

9 Now, Live has attacked that rate proposal
10 because SoundExchange has not proposed rates that are
11 precisely the interactive benchmark rate or precisely
12 the WSA rates, but rather are somewhere in between.
13 And it seems to be Live's position that if there's a
14 range of reasonable rates, you have to propose rates
15 either at the very top of the range or at the very
16 bottom of the range, but not in between. I think that
17 ignores what Dr. Pelcovits says and it's really just
18 contrary to common sense.

19 It would be nice if economists always had
20 available to them perfect and complete data and were
21 always able to predict the future behavior of markets
22 with mathematical precision to the 15th decimal point,

1 but that's just not reality. Economists necessarily
2 have to work with imperfect data and less than totally
3 complete data. And as a result, it's natural to
4 expect that what economists are going to come up with
5 is not one precise number but rather a range within
6 which the market would set rates.

7 That's what Dr. Pelcovits did. And as he
8 testified, anything that falls within that range is a
9 reasonable market rate in this case. So there is
10 support from Dr. Pelcovits's testimony for the
11 SoundExchange rate proposal. Indeed I believe we
12 asked Dr. Pelcovits about that.

13 CHIEF JUDGE SLEDGE: There was complaint
14 that no witness presented and supported the
15 SoundExchange proposed rates. What's your response to
16 that?

17 MR. HANDZO: Well, I would disagree with
18 that a little bit because I believe Dr. Pelcovits was
19 asked about the SoundExchange rate proposal. In fact
20 I believe those rates actually are in Dr. Pelcovits's
21 written testimony. And what he said is yes, I know
22 what the SoundExchange rate proposal is, and yes, that

1 falls within the range of reasonable rates that I've
2 identified, and therefore I believe that is an
3 appropriate for the Court to set.

4 So there is that economic analysis. Now, as
5 far as sort of a noneconomist witness testifying about
6 the rate proposal, frankly I'm not sure that would be
7 terribly relevant to the Court.

8 It seems to me the question really here is
9 is there economic support for it. From
10 Dr. Pelcovits's testimony, there is.

11 JUDGE WISNIEWSKI: But Dr. Pelcovits didn't
12 address the issue of an increasing number.

13 MR. HANDZO: That may be right. I frankly
14 don't recall. As I say, I think there is,
15 nevertheless, support for it because in the WSA
16 agreements, there is that step up over time. And this
17 essentially kind of mirrors the way that steps up. So
18 there -- you can look at that evidence and see that
19 willing buyers and willing sellers have agreed to
20 increase the rates over time.

21 JUDGE WISNIEWSKI: But Dr. Pelcovits did not
22 provide that as part of his analysis on the benchmark

1 that he used.

2 MR. HANDZO: No, I think what he did was he
3 sort of agreed that that rate proposal which includes
4 the step up is a reasonable marketplace rate. I don't
5 recall that he specifically addressed the increase --
6 the amount of the increase from each step. But,
7 again, it does track the WSA agreements.

8 Now, just going back maybe into a little
9 more detail into each of these methods of analysis and
10 the particular criticisms that have been leveled by
11 Live at some of them. I'll start with the interactive
12 services benchmark.

13 As I said, benchmarking analysis, I think
14 widely accepted generally and by this court. Although
15 Dr. Salinger in his written testimony called
16 benchmarking a conceptual shortcut, it turns out that
17 actually the one time he testified in a rate setting
18 proceeding, he himself used a benchmarking analysis.
19 So it's clearly supportable.

20 Again, no one -- there were three economists
21 who testified here, Dr. Fratrik, Dr. Pelcovits --
22 actually four, Pelcovits, Ordover, Salinger, Fratrik.

1 Nobody has suggested that you should look at -- if
2 you're going to use a benchmarking analysis, that
3 there's any different market that you should look at
4 besides the on-demand market.

5 Obviously the key to any benchmarking
6 analysis is to appropriately adjust for the
7 differences between the benchmark market and the
8 target market. Here the significant difference
9 between the two markets is interactivity. And as
10 Dr. Pelcovits explained, he adjusted for this
11 difference between the markets based on his conclusion
12 that the ratio between the revenue per play and the
13 royalty per play would be approximately the same in
14 both.

15 And Dr. Salinger, Live's rebuttal expert,
16 really had no quarrel with that conclusion. It's
17 basically the same approach that Dr. Pelcovits used in
18 the Webcasting II case, which this Court accepted.

19 I think Live has one, what I'll call big
20 picture challenge to what Dr. Pelcovits did.
21 Dr. Salinger faults Dr. Pelcovits for using what he
22 says are the wrong revenue numbers in the statutory

1 webcasting market. He argues that Dr. Pelcovits
2 should have used the sort of lower revenue numbers
3 reflecting revenues obtained from ad-supported
4 services as opposed to revenues from subscription
5 services.

6 And that argument is wrong for a variety of
7 reasons. First and maybe most importantly,
8 Dr. Salinger assumes a market where webcasting
9 revenues are attributable only to ad revenue or
10 subscription revenue. And that's simply not correct.
11 Webcasters make money from music in lots of ways
12 beyond just selling ads and subscriptions. And Live
13 itself is a very good example of that.

14 As we started to discuss a little bit
15 earlier, Live sells ads, it sells subscriptions, but
16 over 40 percent of its revenue comes from what it
17 calls its broadcast service. And I can't really
18 define it, but basically they appear to be referring
19 to selling bandwidth and back office services to
20 people who want to webcast.

21 But as much as Live wants to say those are
22 separate lines of business, they're not. Live's

1 ability to sell what it calls broadcast services is
2 substantially enhanced by the fact that it's offering
3 those so-called broadcasters the opportunity to be
4 part of Live's webcasting business. In fact I think
5 we saw that in some of the documents where they're
6 actually -- their promotional materials to their
7 so-called broadcasters say, you know, the first reason
8 why you should be a broadcaster with Live, ability to
9 be part of our webcasting network, have your station
10 on as one of our channels. So they're obviously using
11 one to sell the other.

12 And Dr. Salinger actually acknowledged that.
13 He -- I asked and he agreed that Live earns revenues
14 in addition to ad and subscription. He agreed
15 specifically that if you're setting a royalty for
16 Live, you would have to take that additional revenue
17 from what they call broadcasting into account when you
18 determine what the appropriate royalty is. So that's
19 coming from their own witness.

20 But then when Dr. Salinger faults
21 Dr. Pelcovits for allegedly assuming more revenue per
22 play than there is, Dr. Salinger pretends that

1 webcasters only earn revenue from ads and subscription
2 when he knows perfectly well that's not the case, and
3 he knows it because the entity that retained him,
4 Live, earns 40 percent of its revenue in other ways.

5 It's not just Live that does that.

6 Dr. Ordover testified about the different business
7 models in the webcasting market. And as he testified,
8 there are portals like AOL and Yahoo, which, in
9 addition to selling advertising, are using music to
10 bring people into the portal so that they will go
11 other places and look at ads on other sites, or using
12 music to help keep them there longer. So it's
13 enhancing their overall business in a way that earns
14 money for them that's not reflected directly in
15 advertising revenues that are directly related to the
16 webcasting.

17 The Rhapsody service, which formerly was
18 owned by Real and I think is now independent, uses
19 statutory webcasting in large part to upsell to its
20 subscription on-demand service.

21 Terrestrial broadcasters who simulcast are
22 using webcasting essentially to enhance their

1 terrestrial service and prevent people from leaving
2 that service and going to webcasting, or reaching
3 consumers who are beyond the range of their
4 terrestrial signal.

5 So there are lots of different ways that
6 webcasters are using music to make money -- I promise
7 I won't use the word "monetize" -- but to make money
8 without --

9 JUDGE WISNIEWSKI: You just did.

10 MR. HANDZO: I won't use it again. To make
11 money that doesn't involve advertising and
12 subscription, which is all that Dr. Salinger
13 considered.

14 And I think the proof of that comes when you
15 look at how Dr. Salinger tried to prove his thesis
16 that the revenues Dr. Pelcovits was using were too
17 low.

18 The first thing he did was he tried to
19 figure out what the average revenue per play was for
20 Pandora and Live. And then he averaged the two in
21 order to claim that the number is too low and the
22 rates were unaffordable.

1 In fact, actually, if you look at the number
2 that Dr. Salinger calculated for Live, I think it came
3 out to be .0048 dollars per performance, looking just
4 at the ad revenue and subscription and not at any
5 other revenue. Now, Dr. Salinger said, okay,
6 Dr. Pelcovits's analysis would show that the ratio of
7 the royalty to the revenue is about 47 percent. That
8 is the royalty tends to be about 47 percent of the
9 revenue. Well, if you take that .0048 that he
10 calculated for Live as its revenues just from ad and
11 subscription, and apply that ratio, actually you come
12 out right about where SoundExchange's rate proposal
13 is.

14 So Dr. Salinger's testimony doesn't prove
15 his point. Actually it kind of proves ours, that the
16 rate proposal is perfectly appropriate.

17 The other thing, in order to get that number
18 down, what he did was he averaged the Live number with
19 the Pandora number. But the Pandora number that he
20 got, he got the total revenues from a couple of
21 newspaper articles. I mean, which does not seem to be
22 a terribly reliable source of information. And,

1 indeed, Dr. Salinger didn't really claim that it was.
2 He kind of backed off and said well, this is really
3 just illustrative. It's just not something that can
4 be relied on.

5 The other way that Dr. Salinger tried to
6 approach it was to look at industry-wide advertising
7 revenues and subscription revenues. And he tried to
8 construct an overall average of what webcasters earned
9 from those two sources.

10 And the way he did that was he looked at --
11 for the advertising market, he looked at AccuStream
12 data for industry-wide revenue. And with respect to
13 the AccuStream data, Dr. Salinger doesn't know how
14 AccuStream collects its data. He doesn't know how
15 many webcasters AccuStream gets data from or whether
16 actually AccuStream gets data from any webcasters.

17 And by the way, actually I think AccuStream
18 is exactly the same report that this court faulted
19 Dr. Brynjolfsson for relying on in the Web II case.

20 There's another source of industry-wide
21 revenue. That's the ZenithOptimedia report that
22 Dr. Fratrik relied on. And it reports twice the

1 revenue, ad revenue that AccuStream reports.

2 Dr. Salinger rejected that report without even talking
3 to Dr. Fratrik who relied on it. So I think his data
4 is highly suspect, to say the least.

5 And then with respect to subscription
6 revenue, Dr. Salinger concluded that .24 percent of
7 plays are subscription supported. But he admitted
8 that number was based on just a portion of the -- a
9 subset of the webcasting business. He didn't look at
10 the whole webcasting business. He excluded, for
11 example, webcasters like Sirius/XM, which is entirely
12 subscription supported.

13 So in short, his data is flawed. And at the
14 end of the day, the more important point is that it's
15 not Dr. Pelcovits who failed to consider how
16 webcasters earn money. It's Dr. Salinger who failed
17 to consider all the ways they earn money.

18 Live has a number of other challenges to the
19 Dr. Pelcovits benchmark analysis. But I don't
20 actually think they require extended discussion. And
21 in some cases I'm not capable of giving them extended
22 discussion. And in particular, there's a criticism of

1 the regression analysis by Dr. Pelcovits which I
2 certainly am not going to hold myself out as a
3 regression expert.

4 But the principal point here is that that
5 criticism is simply irrelevant. And Dr. Salinger
6 basically said this criticism is irrelevant.

7 The reason it's irrelevant is that the
8 regression was part of Dr. Pelcovits's method of
9 calculating the interactivity adjustment. And he
10 calculated it two ways. One way was he looked at the
11 ratio between the subscription prices in the
12 interactive market and the subscription prices in the
13 statutory webcasting market and came up with a ratio.
14 And then he did basically the same thing. But,
15 instead of using the actual prices in the webcasting
16 market for subscription services, he came up with a
17 number based on a regression.

18 And Dr. Salinger said, look, I think he did
19 his regression wrong. But, you know, it really
20 doesn't matter because he had two ways of calculating
21 this. I didn't like the one way but the other way is
22 fine. So at the end of the day, it doesn't really

1 matter.

2 Dr. Salinger also faulted Dr. Pelcovits for
3 failing to consider --

4 JUDGE WISNIEWSKI: Did he say it doesn't
5 matter or it results in a somewhat different number?

6 MR. HANDZO: I think it would result in a
7 very slightly lower number. But it wouldn't be -- it
8 would still be above SoundExchange's rate proposal.

9 JUDGE WISNIEWSKI: Thank you.

10 MR. HANDZO: Dr. Salinger also faulted
11 Dr. Pelcovits for failing to consider indie contracts,
12 which he said would be a problem if, but only if, two
13 things were true. Number 1, indies were a significant
14 part of the market, and number 2, indies were likely
15 to agree to royalties less than what the majors agreed
16 to.

17 The problem is that Dr. Salinger couldn't
18 say any of those things. He admitted that he didn't
19 know what percentage of the market indies represent.
20 And he also admitted that he really didn't know and
21 didn't have an opinion on whether indies would sell
22 their music for more or less or the same as -- as the

1. majors.

2 He did say he thought there were some
3 contracts where indies sold music for less but he
4 hadn't read them. He didn't know how many there were.
5 He didn't know what dates they were. And as I say, I
6 think that his final word on the subject was to admit
7 that he had no opinion.

8 So he faulted Dr. Pelcovits for not using
9 indie contracts, but then said it only matters if
10 these two things are true, and I don't know whether
11 they're true or not. So there's really not much to do
12 with that.

13 Dr. Salinger also faulted Dr. Pelcovits for
14 not taking into account the sort of trends in the
15 numbers. And this issue relates to Dr. Pelcovits's
16 use of the effective per play rate in the interactive
17 on-demand market. Basically he was trying to figure
18 out what effective per play rate was paid by on-demand
19 services. And he looked at it for I believe a period
20 of 3 years and averaged that.

21 And Dr. Salinger said no, no, no, the trend
22 was downward over that time. So you should have taken

1 the last year, which would have given you a lower
2 effective per play rate. But it's sort of the same
3 thing. It doesn't matter.

4 Dr. Salinger said that what you -- you know,
5 the fix for that problem would be to multiply the
6 Pelcovits derived rate by .01917 over .02194. And I
7 haven't done the math myself but I am reliably
8 informed and therefore believe that if you do that
9 math, once again, the change to the interactive
10 benchmark is going to be so small that it's still
11 above the rates that SoundExchange proposes. So at
12 the end of the day it's -- whatever you make of that
13 criticism, it doesn't affect the outcome here.

14 So I would submit to you that the evidence
15 in this case, as the evidence was in Web II, is that
16 interactive on-demand market is a solid basis to set
17 the rate. It's even more so, because in this case, we
18 have corroboration in the form of the WSA agreements.

19 As you know, there are two agreements
20 covering for-profit webcasters. The first was
21 negotiated between SoundExchange --

22 JUDGE WISNIEWSKI: Again, I'm confused by

1 the term you just used of corroboration. Because you
2 had previously referred to them as a separate
3 benchmark.

4 MR. HANDZO: You know, actually, I have to
5 say, as I said the word "corroboration," I immediately
6 regretted it before you even said that. I think that
7 was probably a poor choice of words. I think that's
8 not really the way we are looking at them. They are
9 in fact two different ways of coming up with the rate
10 that have their independent values. And I think you
11 should look at them as setting a range.

12 But I do think it's useful to look at them
13 because -- well, for a number of reasons. One is that
14 obviously they are agreements with voluntary buyers.
15 They do cover a substantial percentage of the
16 webcasting industry. And it's the same right being
17 sold that is at issue in this court.

18 Now, obviously these negotiations took place
19 in circumstances where the rate would be set by this
20 court in the event that the parties failed to reach an
21 agreement. So economists don't really like to refer
22 to them as marketplace benchmarks.

1 But as Dr. Ordoover testified, and I think
2 Dr. Salinger agreed, when buyers are negotiating a
3 rate in a situation where the failure to reach a deal
4 results in a rate-setting procedure, that the buyers
5 anticipate that the Court is going to set a market
6 rate, then they're unlikely to agree to a higher than
7 market rate. And that's the circumstance here.

8 So there is reason to rely on these rates
9 because the circumstances in which they were
10 negotiated, although it was overshadowed by a
11 potential regulatory proceeding, everybody expected
12 that the outcome of that regulatory proceeding is to
13 set a market rate. And so that's what they would try
14 and achieve in their negotiation.

15 The WSA agreements, though, I think are
16 particularly useful here because they -- they shed
17 some additional light on this market.

18 One of the primary arguments by Live that I
19 referred to earlier is that the interactive benchmark
20 market is really looking a lot at the subscription
21 services. Well, these WSA agreements, at least the
22 WSA agreement with the NAB broadcasters, involves

1 services that are ad supported. They are not
2 subscription services.

3 So when the Court looks at the range of
4 rates calculated by Dr. Pelcovits, you have the
5 interactive services benchmark at the upper bound, and
6 voluntary agreements with ad-supported broadcasters at
7 the lower bound.

8 And it simply can't be said that
9 SoundExchange's evidence in this case ignores
10 ad-supported webcasters. It doesn't, because that's
11 exactly what the agreement with the NAB broadcasters
12 is.

13 So with that, I want to turn to Live's
14 challenges to the WSA agreements. First, Live argues
15 those agreements were negotiated by SoundExchange
16 rather than the individual record companies, and that
17 for that reason they are not useful evidence.

18 And it is, of course, true that this court
19 has held that the willing sellers in the hypothetical
20 market are the record companies, or the individual
21 record companies. But the statute doesn't require
22 that a voluntary agreement between a willing buyer and

1 willing seller -- doesn't require that the court can
2 only consider agreements between the actual
3 hypothetical willing buyers and willing sellers. The
4 court can consider, you know, any useful evidence.
5 The question really becomes what effect does it have
6 that SoundExchange was the seller in this case as
7 opposed to the individual record companies.

8 And we address that in the testimony. The
9 economists who have testified in this case actually
10 all agreed that whether negotiations by SoundExchange,
11 rather than the record companies, would result in a
12 higher or lower rate depends on whether the buyers
13 view the record companies as complements or
14 substitutes. If the buyers view the record companies
15 as complements, then the effect, according to
16 Dr. Ordovery and Dr. Salinger, of having SoundExchange
17 negotiate is that it would result in actually a lower
18 rate than what would have been negotiated by the
19 individual record companies on their own.

20 And as Dr. Ordovery explained, the NAB
21 companies, at least, would necessarily view the sound
22 recordings controlled by individual record companies

1 as complements.

2 The reason for that is this. The NAB
3 broadcasters create their programming for their
4 terrestrial business in the first instance where they
5 don't need a license. And so they're incorporating
6 music from all of the record companies because they
7 don't need licenses and they don't need to pay for it
8 so they have music from everybody.

9 Then, having created that programming for
10 their terrestrial broadcasting, they're then trying to
11 put it out over the Internet. Now, they've got
12 essentially baked into their programming music from
13 all the record companies, so they need licenses from
14 all the record companies. In that circumstance, it's
15 kind of unique, but in that circumstance they're going
16 to view the record companies as complements, not
17 substitutes.

18 And, again, according to Dr. Salinger and
19 Dr. Pelcovits, that means that SoundExchange
20 negotiating on behalf of the record companies is
21 likely to result in a lower rate, not a higher rate.

22 Live has argued that this court found in

1 Web II that webcasters don't necessarily need all of
2 the major record companies. But Live is simply
3 ignoring the particular argument that Dr. Ordoover
4 made, which is, whatever it might be more generally,
5 if you're looking at the NAB broadcasters in that
6 particular settlement, the NAB broadcasters really do
7 need all of the record companies, and for that reason
8 these are complements and the rate would be lower.

9 There are other reasons why the negotiations
10 by SoundExchange on behalf of the record companies
11 doesn't really present an issue here. Again, one of
12 them is that the parties were negotiating in a context
13 where they had resort to this court if their
14 negotiations failed to produce an agreement.

15 And the fact that a rate-setting procedure
16 exists to set a market rate in the absence of an
17 agreement would tend to restrain any exercise of
18 market power that SoundExchange might otherwise have
19 had were it negotiating on behalf of everyone where
20 there wasn't a regulatory setting. And Dr. Salinger,
21 again, agreed with that.

22 Also in this case, in the case of the NAB

1 agreement, SoundExchange was negotiating with the NAB,
2 an entity that represented a large number of buyers.
3 As Dr. Ordoover testified, that fact gave the buyers
4 substantial market power as well, which would offset
5 any market power that could have been exercised by
6 SoundExchange.

7 So the fact that these agreements were
8 negotiated by SoundExchange should not affect the
9 outcome here.

10 Dr. Salinger also argued that you should
11 reject the WSA agreements because the sellers, the NAB
12 or Sirius/XM, may have been engaged in a strategy of
13 raising their rivals' costs.

14 Now, that I think it has to be said is a
15 theory that is wholly and totally devoid of any
16 evidence. There is simply no evidence in this record
17 to say that's what the buyers in those agreements were
18 trying to do, despite the fact that SoundExchange
19 produced its negotiating documents with respect to
20 those agreements.

21 And in any event, that strategy of trying to
22 raise your rivals' costs would not work unless

1 SoundExchange decided to go along with it. Because if
2 SoundExchange obtained a higher than market rate from
3 the NAB companies and Sirius/XM, but then gave a lower
4 rate to other webcasters, that strategy would have
5 backfired on the NAB and Sirius/XM. They would have
6 been paying higher rates and their competitors would
7 wind up paying lower rates. They would have only
8 succeeded in raising their own costs vis-a-vis their
9 competitors, not the other way around.

10 There's certainly no evidence in this case
11 that SoundExchange decided to help the NAB beat its
12 competition.

13 For that matter, in a sense, in order for
14 the raising rivals' cost strategy to work, this court
15 in effect would have to go along with it as well.
16 Because if the NAB companies and Sirius/XM agreed to
17 pay an above market rate, and then other webcasters
18 came to this court and the court set a lower rate for
19 those webcasters, the NAB and Sirius/XM would have
20 shot themselves in their collective foot. Again, they
21 would have been stuck paying higher rates when their
22 competitors get lower rates.

1 So you wouldn't go into the strategy,
2 because you would have no way to assure yourself that
3 this court isn't going to set an appropriate market
4 rate which, according to Dr. Salinger, would be lower
5 than what the NAB and Sirius/XM agreed to pay. So it
6 really just doesn't make a lot of sense.

7 I think the thing that puts an exclamation
8 point on that argument is that there is a way that NAB
9 and Sirius/XM could have tried to protect themselves
10 against that downside risk of this strategy that
11 Dr. Salinger hypothesizes.

12 The way to protect yourself would have been
13 to put a most-favored nations clause in the
14 agreements, so that if anybody else got a lower rate
15 than the NAB companies or Sirius/XM, they would get
16 the benefit of that lower rate. That isn't what
17 happened. There isn't a most-favored nations clause,
18 I believe, in the Sirius/XM agreement, and there's a
19 limited one in the NAB agreement. But actually the
20 limited one only applies to lower rates to other
21 broadcasters. It doesn't apply to any rates that this
22 court would set or to lower rates for nonbroadcaster

1 webcasters.

2 So it doesn't make any sense to say that
3 they were pursuing a strategy of raising their rivals'
4 costs because they didn't do the obvious thing that
5 one would do to protect your side against that
6 downside risk of putting in a most-favored nations
7 clause.

8 Dr. Fratrik has a few other arguments about
9 why you should ignore the WSA agreements. He argues
10 that because the NAB negotiated separate limited
11 performance complement waivers with the record
12 companies, the NAB got a benefit for which they are
13 willing to pay higher rates.

14 Now, I characterize those as limited waivers
15 because they were limited. They weren't across the
16 board performance complement waivers. Basically what
17 they said was we'll give you a performance complement
18 waiver only and to the extent that you are
19 broadcasting traditional broadcasting, terrestrial
20 broadcasting kinds of programming, which tends to be
21 very broad-based, not, you know, six songs from one
22 album all in a row. In fact most of the waivers, even

1 though they're a waiver, they preclude doing that. So
2 it was not a broad, across the board waiver.

3 But in any event, the problem with
4 Dr. Fratrik's argument is that both the NAB companies
5 and the record companies anticipated a benefit from
6 the waivers.

7 For the record companies, the expectation
8 was that the waivers would bring more broadcasters
9 into the webcasting market, which obviously would
10 result in more royalties, which of course would
11 benefit the record companies. So they had a reason to
12 do it and a benefit to them, which would suggest that
13 they're not extracting a higher rate in return for
14 this. Where both parties get a benefit from the
15 performance complement waiver, there is just no reason
16 to think that the price was affected.

17 And there's essentially a bigger problem
18 with Dr. Fratrik's argument. And that is that if his
19 theory were right, then Sirius/XM and the other
20 commercial webcasters that are part of the -- that WSA
21 agreement should have negotiated materially lower
22 rates because they didn't get a performance compliment

1 waiver.

2 In fact, though, the rates agreed to by
3 Sirius/XM and the other commercial webcasters are very
4 close to what the NAB agreed to. So the performance
5 complement waivers that the NAB got do not appear to
6 have had any impact on the price, since the people who
7 didn't get those waivers are paying about the same
8 thing.

9 Now, Dr. Fratrik also argues that the
10 alleged differences in cost structures between
11 broadcasters and Internet-only webcasters would lead
12 to broadcasters and Sirius/XM agreeing to higher rates
13 than other services could pay.

14 He's presented no empirical evidence to
15 support that, no empirical evidence that there really
16 are different cost structures between the different
17 webcasters. And he acknowledged that terrestrial
18 broadcasters actually incur some costs that
19 Internet-only webcasters don't incur, such as the cost
20 of an FCC license or paying for on-air talent.

21 Now, Live points to the fact that
22 simulcasters, broadcasters have no additional

1 programming costs for their webcasting because they've
2 already essentially incurred those costs to create
3 their terrestrial programming.

4 But the irony here is, actually, that's also
5 true of Live. Live doesn't pay to create its
6 programming either because the people it calls its
7 broadcasters, who actually pay for the privilege of
8 doing this, create the programming for them. So it's
9 really not a distinction here.

10 Essentially Live's argument about the
11 difference in cost structures between broadcasters and
12 other commercial webcasters, is really kind of a
13 recycling of the argument that broadcasters made in
14 Web II, except now it's the other way around. In
15 Web II, the broadcasters were saying we have to have
16 lower rates. Now Live is saying the broadcasters
17 actually can pay higher rates.

18 The bottom line is the Court rejected the
19 flip side of this argument in Web II and it should be
20 rejected again here.

21 JUDGE WISNIEWSKI: Mr. Handzo, remind me, do
22 the broadcasters get the same rates when they engage

1 in something other than simulcasting?

2 MR. HANDZO: I believe the -- I'm not sure
3 of the answer to that. I'll have to check. Actually
4 the answer is yes, they do.

5 Another argument made by Dr. Fratrik is that
6 the rates agreed to by Sirius/XM and the NAB are
7 higher because they were just avoiding the litigation
8 costs of litigating in this court.

9 Again, I think that's an argument that
10 really doesn't withstand scrutiny. There's evidence
11 in the record that the projections of what the NAB
12 companies would pay in royalties over the upcoming
13 license term, it's something like \$230 million. So
14 even a tiny increase in the rate would quickly dwarf
15 any cost you would save by not litigating.

16 So it just doesn't make sense when you
17 consider the magnitude of the rates that are --
18 royalties that are being paid over time.

19 And in any event, the NAB companies always
20 had the option of not settling but also not
21 litigating. Just because you don't have a settlement
22 with SoundExchange doesn't mean that you need to come

1 to this court and have to litigate. SoundExchange may
2 have to, but the others don't. So that argument, too,
3 I think can be dismissed.

4 Lastly, I think Dr. Salinger argues that the
5 rates agreed to under the WSA agreements for the final
6 years of the current rate term are lower. And anyone
7 who doesn't get those rates, because they're not part
8 of that deal, should pay less in the upcoming rate
9 term than the NAB companies and Sirius/XM will pay.

10 I think that just ignores how markets
11 actually work. If someone comes into the market, a
12 new webcaster comes into the market in 2012, you would
13 expect in an unregulated market that they're going to
14 pay the market rate at that time. They're not going
15 to be able to go to a seller and say, gee, I would
16 like to pay less than everybody else is paying in the
17 market right now because everybody else paid less four
18 years ago when I wasn't in the market. That's not how
19 the market is going to work.

20 So I think that argument as well can be
21 rejected.

22 JUDGE WISNIEWSKI: Mr. Handzo, how is that

1 argument relevant that you just made? They're not a
2 new webcaster.

3 MR. HANDZO: No, they're not. But I think
4 what we're talking about here is setting rates for
5 webcasters generally. And what we're talking about is
6 how would the market set a rate. What rate would the
7 market set in 2012.

8 JUDGE WISNIEWSKI: Can you make that same
9 argument, replacing what you used?

10 MR. HANDZO: Yes, I think so.

11 JUDGE WISNIEWSKI: With existing webcasters?

12 MR. HANDZO: If you -- there's no reason why
13 the sellers, again, in an unregulated market, would
14 agree to let Live pay less during the upcoming rate
15 term than everybody else is paying. It would be
16 against the interests of those sellers. Because why
17 would you want to let someone who is paying less in
18 effect take market share from the people who are
19 paying more? You would never do that.

20 Once you've got, you know, a rate
21 established, essentially, as your market rate, that's
22 what you're going to want to get from all of the

1 buyers. Because, otherwise, you're cutting your own
2 throat, giving a lower rate to somebody who's taking
3 business away from the people who are paying you more.

4 JUDGE WISNIEWSKI: Doesn't the argument
5 you're now making presume there has to be exactly the
6 same rate in each year for all of the people who
7 participate in the market?

8 MR. HANDZO: Well, I think, if what you're
9 asking is would sellers price-discriminate between
10 different webcasters at any given time --

11 JUDGE WISNIEWSKI: No, I'm not. I'm asking
12 whether there can't be differences between different
13 buyers in the market from year to year. After all,
14 you had differences between the NAB agreement and the
15 XM/Sirius agreement.

16 MR. HANDZO: There are some small
17 differences. And I don't think anyone would say that,
18 in the marketplace, the rate is going to be, you know,
19 necessarily precisely the same negotiated for every
20 single webcaster. I think, absent the regulatory
21 environment, you might see some slight differences
22 from webcaster to webcaster.

1 JUDGE WISNIEWSKI: So the conclusion from
2 that is that you could grant them a slightly lower
3 rate than the NAB agreement. And that would be
4 perfectly consistent with still having a rate that
5 everybody is happy with in the market.

6 MR. HANDZO: Well, I think --

7 JUDGE WISNIEWSKI: "Happy" being a relative
8 term.

9 MR. HANDZO: Hypothetically and with
10 emphasis on the word "slight." You know, I can't see
11 anyone agreeing to any difference that would ever be
12 considered material. All I'm saying, I think, is if
13 you have a lot of buyers negotiating with a lot of
14 sellers, you wouldn't expect them all to wind up in
15 precisely the same place. But to the extent that this
16 court --

17 JUDGE WISNIEWSKI: But you said yourself, or
18 seem to imply yourself that even 1/10,000 of a cent in
19 a market this large was material.

20 MR. HANDZO: Well, certainly for the NAB
21 webcasters, that turns out to be the case. I think
22 the reality then is -- I think realistically, if what

1 we're talking about is Live, it's hard for me to see,
2 in an unregulated market, given Live's size, that
3 willing sellers would agree to anything less than what
4 they agreed to with the NAB and Sirius. I can't see
5 any reason why they would ever do that. Because,
6 again, it would be contrary to their interests. If
7 Live is competing with those others, it would be
8 contrary to their interests to give a lower rate to
9 somebody who is going to take market share away from
10 somebody who is paying you a higher rate.

11 So hypothetically, is it possible that you
12 can have lots of companies negotiating lots of rates
13 and they're not going to come out precisely the same,
14 maybe some slightly higher, some slightly lower, sure,
15 that's possible. But I think if we're talking about
16 Live, there is no reason in the world --

17 JUDGE WISNIEWSKI: The key is the question
18 of -- the fact that there are competitors.

19 MR. HANDZO: I think, yes, it does matter
20 that there are competitors. I think everyone would
21 agree that Live is a competitor of the other
22 webcasters in the market. In fact, that's really

1 Dr. Salinger's principal point when he talks about
2 raising rivals' costs. The whole premise of that is
3 that Live and others are competitors with the rest of
4 them.

5 JUDGE WISNIEWSKI: And, indeed, when you
6 have competitors, then you don't have the opportunity
7 for price discrimination.

8 MR. HANDZO: I think that is correct as
9 well. To the extent that they are competing, you're
10 not going to price-discriminate. And so the price
11 that you've agreed to with NAB and Sirius/XM is the
12 price that you're going to insist on from other
13 competitors such as Live.

14 JUDGE WISNIEWSKI: Why do you insist on a
15 higher price in your proposal for Live365 than the --
16 what is essentially the default rate for the
17 commercial webcasters in this proceeding?

18 MR. HANDZO: Well, because we're here to
19 establish what the market rate would be. And as
20 Dr. Pelcovits testified, we've got the, you know, two
21 data points to look at. But we think the actual
22 market is in fact higher. And that's what is in fact

1 what would be charged.

2 And so that is the market rate that you
3 would want if you're negotiating with someone like
4 Live in an unregulated market. That's the point of
5 Dr. Pelcovits's analysis.

6 JUDGE WISNIEWSKI: How could the actual
7 market be higher when the evidence that you've
8 submitted of what is paid in the market consists of
9 the NAB agreement and the XM/Sirius agreement, which
10 are both lower?

11 MR. HANDZO: Well, I think Dr. Pelcovits
12 actually addressed that. What he said was, again,
13 what you do have to take into account is the fact that
14 this is being negotiated, that NAB and Sirius are
15 being negotiated in a circumstance where there is a
16 regulatory setting.

17 And in particular what you have to take into
18 account is the fact that the record companies and
19 SoundExchange under this statutory scheme are
20 compelled sellers. They do not have the option not to
21 sell that they would have in an unregulated market.
22 That's an important right that they would extract

1 value from in an unregulated market.

2 So the fact that they are selling at a
3 slightly lower than market rate is understandable in
4 this context because they are compelled sellers. They
5 would not be in the hypothetical unregulated market.
6 So you would actually expect a higher rate as a
7 result.

8 And that's why, I think, when you sort of
9 look at the two methods of analysis that we've
10 presented, it would actually be natural to expect that
11 in an unregulated market, the rate would be higher
12 than what we negotiated with NAB and Sirius/XM.

13 JUDGE WISNIEWSKI: But then doesn't -- if we
14 were to accept your proposal, doesn't that put us in
15 the position of essentially engaging in producing a
16 hypothetical market that price-discriminates, without
17 having a basis for such price discrimination?

18 MR. HANDZO: No, I think what you're saying
19 is, you know, our mission is to set the rate that
20 willing buyers would pay willing sellers, period. And
21 that rate is what it is, in effect.

22 I think your suggestion is kind of assuming

1 that the NAB and Sirius/XM are the actual -- are where
2 the market would actually come out. And I think my
3 suggestion and Dr. Pelcovits's testimony is it's
4 actually slightly lower than where the market would
5 come out.

6 So under the mandate this court has to
7 follow --

8 JUDGE WISNIEWSKI: Well, but for the
9 agreements. And you're not going to deny the
10 agreements exist, and they're going to exist through
11 the next period of time here that we're talking about.

12 MR. HANDZO: Yeah. No, I certainly don't
13 deny that the agreements exist.

14 JUDGE WISNIEWSKI: So that's what exists out
15 there in the market at the moment and through 2015,
16 isn't it?

17 MR. HANDZO: Well, that's what exists out
18 there if you're going to characterize that as the
19 marketplace agreement.

20 And, again, you know, our argument is it's
21 close to a marketplace agreement because the parties
22 expected that this court would set a marketplace rate.

1 But it may not be precisely that because of the
2 regulatory overshadowing which would have led
3 SoundExchange to agree to a slightly lower rate. So
4 the actual market rate in an unfettered market would
5 be higher.

6 Let me just make sure there wasn't another
7 point that I needed to cover on that.

8 Let me turn to Dr. Fratrick, mindful of the
9 injunction that I really shouldn't use all of my time
10 here.

11 JUDGE ROBERTS: Mr. Handzo, are you leaving
12 the WSA agreements?

13 MR. HANDZO: Yes, I am.

14 JUDGE ROBERTS: Okay. Well, let me ask you
15 one question with respect to that. It's a little bit
16 different than your focus has been up to this point,
17 in that I'm focusing, actually, on the WSA itself, and
18 with respect to the precedential and the
19 nonprecedential agreements. Precedential ones which
20 we've just been talking about.

21 In your proposed findings, you make a
22 statement that the reason for drawing a distinction

1 in -- 114(f)(5)(C) I believe is the provision that
2 allows the submission of agreements reached if both
3 parties are in agreement to do so -- that the reason
4 for allowing agreements to remain out of this
5 proceeding is because the Congress recognized that
6 these agreements and the negotiation process was
7 experimental, and that a number of agreements were
8 likely to be experimental with their rates.

9 And my question to you is, where is your
10 support for that?

11 MR. HANDZO: Support for the proposition
12 that that's what Congress intended?

13 JUDGE ROBERTS: Yes.

14 MR. HANDZO: I confess that I am not
15 conversant enough with the legislative history to
16 point you to legislative history that says that. I
17 think we derived that from the whole purpose of the
18 statute, which was to allow the parties to have the
19 ability to negotiate agreements without the worry that
20 they would necessarily be precedential, which I think
21 implies a desire to let the parties do things that
22 they wouldn't do if they knew these were going to be

1 precedential, which I think implies the ability to do
2 experimental deals or deals where you just want to
3 see, okay, is this going to work? If it doesn't, I'm
4 not stuck with it.

5 JUDGE ROBERTS: So that is your conclusion.
6 I note that your proposed findings don't point to any
7 particular passage or piece of legislative history,
8 such as it is, for that conclusion.

9 MR. HANDZO: I am confident that you have
10 read them correctly unless Mr. Levin tells me
11 otherwise.

12 But I think the language of the statutes --

13 JUDGE ROBERTS: Well, in your rebuttal
14 portion, if you come up with something --

15 MR. HANDZO: That's fine.

16 JUDGE ROBERTS: -- I'm sure you'll bring it
17 to my attention.

18 MR. HANDZO: I will bring it to your
19 attention.

20 I do want to talk about Dr. Fratrik's
21 modeling a little bit more than I did at the outset.
22 As I mentioned, he uses a modeling approach based on

1 data from a variety of sources.

2 And I think it's fair to say that a modeling
3 approach is just difficult to do under any
4 circumstances, because it's hard to get the kind of
5 comprehensive and reliable data that you need. And
6 Dr. Fratrik really doesn't even come close.

7 According to Live's own witness in rebuttal,
8 Dr. Salinger, to model a market, you need cost and
9 revenue data from a representative sample of the
10 industry. Now, mostly Dr. Fratrik is using costs and
11 revenue data from just one company, Live, which even
12 Dr. Salinger says has a unique business model.

13 So he doesn't have comprehensive data from a
14 representative sample of the industry.

15 Now, in addition, Dr. Salinger agreed that,
16 if you have webcasters who use webcasting to promote a
17 related line of business, a modeling approach should
18 consider the revenues from that related line of
19 business when you decide what royalties the webcasters
20 would pay. And Dr. Fratrik wholly ignored that data
21 from Live, although he certainly had it.

22 Moreover, again according to Dr. Salinger,

1 the market mechanism will not necessarily result in a
2 rate that all webcasters can pay. It's possible, for
3 example, that sellers in an unregulated market might
4 set a rate that can be paid only by buyers with a high
5 ability to pay.

6 So in order to model a rate that would be
7 set in the market, you have to know something about
8 the cross-elasticities in the market. Because knowing
9 what the cross-elasticities are helps you figure out
10 where the sellers would price within the range of what
11 buyers could afford. Dr. Fratrik didn't even attempt
12 that analysis.

13 And, again, according to Dr. Salinger, for a
14 marketing approach -- I'm sorry, a modeling approach,
15 you would want to know whether webcasters promote or
16 substitute for other music sales. And Dr. Fratrik
17 tried to claim that webcasting is promotional. But
18 then he wound up acknowledging that it could be
19 substitutional as well and he doesn't know which
20 effect would be greater. So he doesn't account for
21 that variable either.

22 I think it's fair to say that Live's witness

1 in its direct phase of this case, Dr. Fratrik, did not
2 successfully consider the necessary inputs to a model
3 that Live's witness in the rebuttal phase,
4 Dr. Salinger, agreed should be considered.

5 And what data Dr. Fratrik did have was
6 suspect, to put it mildly. Here is how he went about
7 modeling the revenues for the webcasting industry.
8 For subscription revenues, he used Live's data on the
9 theory that Live is typical, although he had no
10 apparent basis for considering Live typical except
11 that it's been around for a while.

12 For advertising revenues, he abandoned his
13 theory that Live is typical and he instead used total
14 webcasting industry revenues from the ZenithOptimedia
15 study.

16 Now, leaving aside whether the
17 ZenithOptimedia data is reliable -- and on this
18 record, we have no way to know that it is --
19 ZenithOptimedia gave Dr. Fratrik only the total
20 industry advertising revenue, but not the total number
21 of plays.

22 So he couldn't figure out from that

1 ZenithOptimedia study what the revenue per play was
2 for advertising, which is what he was trying to get
3 to.

4 So he got the number of plays in the
5 industry from a different source, from AccuStream.
6 And what he does is he divides the total advertising
7 revenues reported by ZenithOptimedia by the total
8 number of plays reported by AccuStream. Even though
9 those two reports have radically different reports on
10 what the size of the advertising revenues in the
11 industry were.

12 The AccuStream data showed revenues that are
13 half what the ZenithOptimedia numbers were. So he's
14 taking plays from one study that's just radically
15 different from the revenues he's using from another
16 study.

17 What's actually somewhat more remarkable
18 here is he actually didn't have to go through the
19 gyrations of using the number of performances from one
20 report and the total ad revenues from another report,
21 because actually the AccuStream report has both, it
22 has total ad revenues and has total number of

1 performances.

2 So why did Dr. Fratrik decide to use one
3 number from one and another number from the other?
4 The reason is that if he just used the AccuStream
5 advertising revenues and performances, the result he
6 would have derived from his model would have shown
7 that in the hypothetical market, the sellers would pay
8 the buyers to use their sound recordings.

9 His model would have proven that there
10 should be a negative royalty, which obviously is an
11 absurd result. So he couldn't just use the AccuStream
12 data. He had to mix and match the way he did to get
13 to a result that had even any facial plausibility.

14 And, finally, with respect to the revenue
15 earned by webcasters like Live, he just ignored the
16 fact that there are revenues besides ads and
17 subscriptions.

18 So that's the revenue side of Dr. Fratrik's
19 model. Now, on the cost side, he reverted to his
20 theory that Live is typical. And he used Live's
21 costs. And I think Live now asserts that Dr. Fratrik
22 never said that they were typical, only that Live is

1 representative. I'm not sure I understand what that
2 distinction is. It begs the question, representative
3 of what. Obviously Dr. Fratrik was holding Live out
4 as representative, typical of other webcasters, with
5 no showing that it is.

6 But, again, leaving that aside, even if you
7 accepted the proposition that Live somehow could be
8 held out as typical of the rest of the industry with
9 respect to its costs, he didn't even address Live's
10 costs correctly. Even though he excluded all of the
11 revenue from what Live calls its broadcaster services
12 business, there were certain line items on the Live
13 P&L where he attributed 100 percent of Live's costs to
14 what it calls its Internet radio business, including
15 information technology and customer support.

16 So he is splitting up the revenues. But at
17 least for some line items he's giving all the costs to
18 the Internet business.

19 And the only thing that Live can say in
20 response to that is that Dr. Fratrik thinks there
21 might be some other unidentified line items that
22 reflect costs attributable to the broadcast services,

1 although none of that appears on the P&Ls that
2 Dr. Fratrik relied on.

3 Now, on top of all of that, in order to get
4 to the results that he wanted, Dr. Fratrik had to
5 assume that webcasters must earn a 20 percent
6 operating margin. And he based that assumption on the
7 margins earned by terrestrial broadcasters. And as he
8 conceded, and I think Dr. Ordoover testified,
9 terrestrial broadcasters have higher capital costs and
10 higher barriers to entry. And that's the reason why
11 they tend to earn higher operating margins. It's not
12 true of webcasting and you can't simply import one
13 number into the other.

14 Then, most fundamentally, and this is a
15 theme I've repeated several times now, but most
16 fundamentally, Dr. Fratrik simply failed to consider
17 Live's business as a whole. He treated Live as though
18 it has two separate and distinct lines of business,
19 which it doesn't.

20 And he did that even though the people who
21 Live calls its broadcasters pay fees to Live, which
22 Live then uses to pay the royalties for the use of

1 music. I mean, you just can't separate these two
2 business. But that's what Dr. Fratrik did.

3 Dr. Ordoover told you that was wrong. Dr. Salinger
4 agreed. And there's just no way to use this model.

5 It should come as no surprise, I think, as a
6 result, that Dr. Fratrik's results just don't make any
7 sense.

8 If his model is correct, then Live should
9 close its doors right now. Because even if you
10 adopted the rate that Dr. Fratrik derives from his
11 model, Live would not earn a 20 percent operating
12 margin. That's what his model shows. And his whole
13 thesis is that webcasters need to earn a 20 percent
14 operating margin if they're going to stay in business.
15 That's what a willing buyer would demand. So even
16 under his own model, Live should be hanging up the
17 gone fishing sign if you adopt his rate. The result
18 just makes no sense. That model is simply
19 irredeemable.

20 Here is the reality test for all of this.
21 Live can pay the rates that SoundExchange is
22 proposing. Live is profitable now. Quite profitable

1 at the current rates. And if you look at Live's
2 business as a whole, using its 2009 data, Live would
3 remain EBITDA positive for every year of the rate term
4 except for the last, 2015. And that assumes there's
5 no increase at all in Live's revenues per play, which
6 is not really a realistic assumption. If nothing
7 else, Live has shown it has the ability to pass on
8 royalty increases, at least to some degree, to the
9 people it calls its broadcasters. We have that from
10 Mr. Lam's deposition.

11 So I would submit that the Court should
12 adopt SoundExchange's rate proposal with respect to
13 commercial rates.

14 I should take just a minute to comment on
15 Live's arguments about promotion and substitution,
16 contribution, cost and risk. The statute does direct
17 the Court to consider those things, although the Court
18 has, we would submit correctly, in the past concluded
19 that if you're looking at a marketplace benchmark,
20 those are already considered as part of the
21 marketplace benchmark so you don't actually need to
22 consider them separately.

1 But with respect to promotion and
2 substitution, SoundExchange did present testimony from
3 record company executives about the substitutional
4 effect of digital music services, including
5 webcasting. . .

6 And Dr. Pelcovits in his analysis performed
7 the same substitution analysis that he performed in
8 Web II, where he assumed that there was a difference
9 in terms of their effect on promotion and substitution
10 between the on-demand market and the statutory
11 webcasting market.

12 SoundExchange also presented testimony from
13 the record companies about their substantial
14 contributions, costs and risks.

15 Now, Live claims to have presented empirical
16 evidence that proves that statutory webcasting is
17 promotional. But that evidence just does nothing of
18 the sort.

19 Dr. Fratrick pointed to some royalty-free
20 agreements with independent labels as evidence of
21 promotional effect of webcasting. But all of those
22 agreements are at least five years old. And some of

1 them require Live to undertake active promotion of the
2 label's music.

3 So those agreements don't prove that
4 webcasting is promotional. They simply prove that
5 some record labels will waive the royalty if they get
6 other consideration in the form of Live's promotional
7 efforts.

8 And, interestingly, Live's own witness,
9 Dianne Lockhart, testified that when she tried to
10 convince a record company to waive the royalty for her
11 station, she was summarily rejected.

12 Live also relies on Mr. Smallens's inclusion
13 of a quote from somebody named Russ Crupnick, about
14 the allegedly promotional benefits of statutory
15 webcasting. But the study that Mr. Crupnick is
16 referring to is not in evidence. His methodology is
17 entirely unknown and has no probative value here
18 whatsoever.

19 With respect to the relative contributions,
20 costs and risks, Live has focused only on factors with
21 respect to webcasting services and totally ignored the
22 contributions of the record companies. And I don't

1 think there can be any real dispute that the record
2 companies make extremely significant contributions,
3 incur huge costs, and have assumed risks with respect
4 to the creation of the copyrighted works that are at
5 issue here.

6 So ultimately, although Live claims to have
7 presented evidence justifying a downward adjustment to
8 account for promotion and risk and contribution, they
9 haven't given any evidence that those factors exist
10 and certainly haven't given any way to quantify it.

11 Now, I do want to touch on the -- there are
12 a few remaining issues in the case which I can move
13 through quickly. I think the minimum fee, which we
14 proposed \$500 per station or channel with a \$50,000
15 cap for commercial webcasters. Live agrees with that.
16 And the parties have submitted a stipulation to the
17 Court with respect to that.

18 It is the minimum that was adopted by this
19 Court for the rate period, the current rate period in
20 the Web II case. And there is significant evidence to
21 support it.

22 The NAB and the Sirius/XM WSA agreements

1 have that same minimum and cap. And SoundExchange has
2 presented evidence regarding its administrative costs
3 being higher than that amount. And that, too supports
4 the minimum that we proposed.

5 JUDGE ROBERTS: Mr. Handzo, in your view,
6 what if any precedential effect does our adoption in
7 Webcaster II of the \$500 fee have in this proceeding?

8 MR. HANDZO: I don't think the Court is
9 bound in some stare decisis way by its decision in
10 Web II. But I think the reality is that the
11 evidential record in both cases is very similar. And
12 it stands to reason that, where the evidence in two
13 cases is very similar, the result ought to wind up
14 being the same. But I'm not suggesting that you are
15 bound by that.

16 JUDGE ROBERTS: Okay.

17 MR. HANDZO: With respect to the
18 noncommercial rates, SoundExchange has proposed \$500
19 per channel or station per year unless the
20 noncommercial webcaster exceeds 159,140 ATH per month,
21 in which case, for the amount over that level, they
22 would pay the rates proposed by SoundExchange for

1 commercial webcasters.

2 IBS actually agrees with the payment of the
3 commercial rates that we proposed over 159,140 ATH per
4 month. It actually agrees that noncoms who have more
5 than 15,914 ATH per month should pay an annual fee of
6 500.

7 So actually the dispute in this case between
8 SoundExchange and IBS is really over the fee that
9 noncoms would pay if they have an ATH lower than
10 15,914 ATH per month.

11 Now, I think the evidence here is that over
12 300 webcasters already pay, noncommercial webcasters
13 already pay that annual \$500 fee for 2009.

14 The agreement that SoundExchange reached
15 with CBI has the same rates that SoundExchange is
16 proposing here. The \$500 annual fee that we're
17 proposing is less than SoundExchange's administrative
18 costs per channel. I think that's in Ms. Kessler's
19 testimony.

20 And although IBS has tried to argue that
21 some of the noncoms can't afford that \$500 annual fee,
22 I don't think the evidence supports that. Actually,

1 the only commercial station that IBS put on was WHUS,
2 UConn, which had a profit of \$87,000 in 2009.

3 And even if the annual budget of small
4 noncoms is \$9,000, which I think is what IBS argues,
5 \$9,000 is still a heck of a lot more than a \$500 fee.
6 It's still a pretty small percentage of that budget.

7 It's interesting to note that anybody who is
8 an IBS noncommercial broadcaster who chooses to go to
9 the IBS conventions is going to pay \$480 for the
10 privilege of attending. You're going to pay 125 just
11 to belong to IBS. So viewed in that context, a \$500
12 fee for being a webcaster is certainly not excessive.
13 And there's really no basis for IBS's proposal.

14 I'm not going to walk through exactly what
15 IBS's proposal is except to say that they're proposing
16 a very low annual fee of I believe \$20 for really
17 small webcasters, and \$50 for slightly larger
18 noncommercial webcasters. I believe that, to the
19 extent that IBS has submitted any evidence at all --
20 and I don't think the evidence they submitted actually
21 supports either those different levels or the
22 amount -- it's basically the same evidentiary record

1 that this court considered recently in I believe the
2 Web II remand, where the Court rejected that evidence
3 and agreed with SoundExchange's proposal of a \$500 fee
4 for noncommercial webcasters below that ATH cap.

5 And, again, since the evidentiary record is
6 basically the same here as it was there, I would
7 submit that the outcome ought to be the same.

8 I probably do need to touch briefly on
9 ephemerals. SoundExchange has proposed that the 112
10 and the 114 rights be bundled together, with 5 percent
11 attributed to the 112 right and 95 percent to the 114.
12 That is likewise the subject of a stipulation between
13 Live and SoundExchange. And IBS I believe also agrees
14 with it. And there is an evidentiary record to
15 support it.

16 There is testimony from Dr. Ford that the
17 ephemerals do have value, that he reviewed agreements
18 in unregulated markets, and those rights generally are
19 sold together as a bundle.

20 And so the only issue really is how do you
21 allocate in that bundle between the ephemerals and the
22 114 rights. And there, the only parties with a real

1 interest in that are the record companies and the
2 artists who agreed in the SoundExchange rate proposal
3 that that should be 5 percent.

4 So I think there is an evidentiary record to
5 support what the parties have stipulated to.

6 Lastly, we have proposed some terms. I
7 think they're all fairly straightforward in the sense
8 of permitting SoundExchange to more efficiently
9 administer and distribute the royalties that it
10 receives. At least one of the terms has been
11 stipulated to. The rest have really not been
12 contested. I think the only real argument here has
13 been that they should be the subject of a separate
14 rule-making procedure rather than determined here.
15 But, I think it is perfectly appropriate for the Court
16 to determine them here in the litigated proceeding.
17 It may be that not everyone has participated. But
18 that can be the same in a rule-making as well. That's
19 always the case.

20 So there really hasn't been any contest with
21 respect to SoundExchange's proposed terms. Nor has
22 anyone really contested SoundExchange's request that

1 it be designated as a sole collective.

2 So if I may, I would like to take 30 seconds
3 to check with my colleagues to see if I've omitted
4 anything that I really should say.

5 Just one point that I had been reminded of.
6 The -- in answer to a question from the Court about
7 whether the rates in the NAB agreement applied to
8 nonsimulcasting. They do. But I should point out
9 that the performance complement waiver does not apply
10 to that.

11 With that, I have nothing further unless the
12 Court has questions for me.

13 JUDGE ROBERTS: You have 30 minutes left for
14 your rebuttal.

15 MR. HANDZO: Thank you.

16 CHIEF JUDGE SLEDGE: Mr. Oxenford.

17 CLOSING ARGUMENTS ON BEHALF OF LIVE365, INC.

18 MR. OXENFORD: Good morning, Your Honor.
19 For the record I'm David Oxenford on behalf of
20 Live365. I always hesitate to follow Mr. Handzo
21 because he always sounds so reasonable. But he
22 reminds me of a book review that I read in the New

1 York Times book review section just 2 weeks ago. It
2 was about a book called "Proofiness: The Dark Arts of
3 Mathematical Deception." And it's a book that I
4 really need to go out and read, I think, if I'm going
5 to be doing cases like this.

6 Because the case talks about the use of
7 statistics and numbers to try to influence policy
8 makers, and how sometimes those numbers are misused.
9 Sometimes those numbers are just the results of urban
10 myths and don't have any basis in reality.

11 Other times, they're the result, according
12 to the review, of a process called disestimation,
13 ascribing too much meaning to a measurement relative
14 to the uncertainties and errors inherent in some of
15 those measurements.

16 I think it's appropriate when we consider
17 the evidence that was provided here, the criticisms
18 that were made, and the facts that have been thrown
19 out here, to assess just where some of this evidence
20 comes from. Where these numbers come from. Which way
21 the perceived errors in fact cut that the parties are
22 accusing each other of using in connection with their

1 numbers.

2 We have heard a lot about the criticism of
3 Dr. Fratrik's testimony. And then a lot to rebut the
4 criticism that we have offered with respect to
5 Dr. Pelcovits's testimony.

6 And I think when you actually sit down and
7 analyze a lot of that criticism, you'll see that
8 almost all of the errors that are urged in
9 Dr. Fratrik's testimony actually benefit
10 SoundExchange. While all of those errors that we may
11 say exist in Dr. Pelcovits's testimony, they don't
12 benefit Live365 if you credit those criticisms.
13 Again, they would benefit SoundExchange.

14 You know, Dr. -- Mr. -- Judge Roberts, you
15 mentioned the whole question of the experimental
16 authorizations. Judge Wisniewski, you were talking
17 about the questions about price discrimination and
18 whether there would in fact be differences in the
19 marketplace. You know, I was struck by
20 SoundExchange's proposed findings, how in the very
21 opening they recognized that there could be different
22 market -- there can be different rates for different

1 players in the market.

2 They recognize that there are eight separate
3 WSA agreements. Certainly we don't have in evidence
4 what those agreements are. But there are at least
5 eight separate agreements out there setting different
6 rates.

7 And, yet, when we propose a rate that's
8 different than what's in the WSA agreements, we're
9 criticized, saying oh, they would never set such
10 agreements. We're criticized for saying that, oh --
11 or we're criticized because we can't show evidence
12 that other agreements are out there in the record. Or
13 we don't have record evidence to show that there are
14 other agreements out there in the marketplace.

15 Yet, again, there are eight agreements, as
16 they say in their own proposed findings. But we're
17 not allowed to say what is contained in those
18 agreements.

19 We're also told that --

20 JUDGE ROBERTS: When you're mentioning that,
21 Mr. Oxenford, wouldn't it be your point of view,
22 however, that no matter how many other WSA agreements

1 there are that are not in evidence in this proceeding,
2 I would presume that they all have been negotiated by
3 SoundExchange. And, therefore, they're not of any
4 value in your view to these proceedings. So what do
5 we need to really know about them in that case?

6 MR. OXENFORD: Judge Roberts, we just need
7 to know that they're out there because we are faced
8 with a number of proposed conclusions that say we've
9 presented no evidence that there are not other
10 agreements out there. Dr. Ordover says, oh, they
11 would never reach agreements at a rate lower than the
12 WSA agreements.

13 JUDGE ROBERTS: But once again, if
14 SoundExchange is the one negotiating them, and we're
15 looking at the hypothetical marketplace, as I read
16 your proposed findings, those agreements, just like
17 the two that have been submitted here, are irrelevant,
18 because it's not the correct seller. And at least
19 with respect to the NAB, it's not the correct buyer.

20 MR. OXENFORD: That's correct. We agree --
21 we believe that the WSA agreements do not present an
22 appropriate benchmark because --

1 JUDGE ROBERTS: Right.

2 MR. OXENFORD: -- SoundExchange is not a
3 willing seller in the context that you've used.

4 JUDGE ROBERTS: Right. But that's why I'm
5 confused as to why you're worrying about the
6 agreements that we didn't see, again, and it is an
7 assumption, that SoundExchange is the one that
8 negotiated all of them --

9 MR. OXENFORD: Correct.

10 JUDGE ROBERTS: -- though I think it's a
11 reasonable assumption. And I don't see why those
12 should bother you either.

13 MR. OXENFORD: Well, they bother me to the
14 extent that SoundExchange has criticized theories,
15 they've criticized statements that witnesses have
16 made, saying that nothing else is out there. They've
17 effectively said that nothing else exists other than
18 what's in the record, and faulted some of our
19 witnesses for providing some of that information.

20 I would suggest that, look at --

21 CHIEF JUDGE SLEDGE: Mr. Oxenford, let me
22 save you some time.

1 MR. OXENFORD: Sure.

2 CHIEF JUDGE SLEDGE: You're in the wrong
3 venue to argue that Congress passed a bad law. We're
4 going to follow the law that Congress passed. So go
5 ahead and deal with the law that was passed.

6 MR. OXENFORD: I understand that, Your
7 Honor. I'm just trying to put in context some of the
8 statements that were made in the reply findings.

9 CHIEF JUDGE SLEDGE: Congress said that they
10 can do it that way. So go ahead and deal with what
11 the law says.

12 MR. OXENFORD: Yes, Your Honor. In fact
13 let's turn, Judge Roberts, to the question about
14 SoundExchange being a willing seller when Dr. -- when
15 Dr. Handzo -- I'm already attributing -- his
16 mathematical abilities have clearly overwhelmed me.

17 JUDGE ROBERTS: They're not that wonderful,
18 Mr. Oxenford, I assure you.

19 JUDGE WISNIEWSKI: There are all kinds of
20 doctors. So....

21 MR. OXENFORD: There are, indeed.

22 When we talk about SoundExchange as being a

1 willing seller, in fact, Mr. Handzo suggests that
2 SoundExchange would actually agree to rates lower than
3 those rates that would be established by webcasters in
4 the marketplace because the record -- the rights to
5 the different record labels are complements, not
6 substitutes.

7 You know, if that was the case, if
8 SoundExchange is always going to set a lower rate than
9 the willing buyer/willing seller rate, we can really
10 cut this argument short because we should just be
11 accepting SoundExchange's rates.

12 But in fact, we've got to look at the
13 reality of what went on. We've got to look at the
14 reality of the negotiation process. We've got to look
15 at the reality of who those parties were that engaged
16 in the negotiation process.

17 You know, we had suggested that there is an
18 element of rivals raising costs here. Mr. Handzo
19 suggests, oh, no, there can't be rivals raising costs
20 because, first of all, SoundExchange would have had to
21 agree to that. Secondly, hey, it's not reflected in
22 any of the settlement documents that were produced in

1 discovery.

2 Well, you know, I can't see in any of the
3 settlement documents the parties, the NAB writing to
4 SoundExchange saying, hey, we want to raise our
5 rivals' costs, or let's set these royalties higher
6 than they otherwise would be. It's not surprising
7 that it's not produced in the documents.

8 Secondly, the -- I lost my train of thought.
9 The other point is that these agreements, the
10 testimony from Mr. McCrady was that these were
11 agreements that were entered into in expectation of
12 the rates that the Court would set. And then they
13 were made precedential by agreement of the parties to,
14 in effect, be used as evidence for what -- the rates
15 that the Court would set. In effect, they're circular
16 agreements. They were set with their belief as to
17 what you would set as rates. And then offered as
18 evidence for what those rates should be, effectively a
19 circular process, a self-fulfilling prophecy, one that
20 effectively provides that kind of guarantee, if you
21 will, to the parties entering into them that there's
22 not going to be lower rates for the rivals of

1 SoundExchange who are -- I'm sorry, of the
2 broadcasters who are appearing before you here today.

3 Now, Mr. Handzo also says that our criticism
4 of the WSA agreements, that these agreements do not
5 reflect the -- or that the economics of broadcasters
6 and pure webcasters, they don't reflect any real
7 differences. That we've ignored the costs that the
8 broadcasters, for instance, have for FCC licenses and
9 that sort of thing.

10 Dr. Ordovery, their own witness, suggested
11 that broadcasters and XM/Sirius are engaging -- would
12 engage in webcasting, would pay royalties for
13 webcasting that didn't allow for effectively any
14 profit margin if it's going to benefit their
15 terrestrial or their core business, the satellite
16 business, the broadcast business.

17 Mr. Handzo throws out the question, oh, they
18 have other costs like FCC licenses. Sure. And
19 they've got lots of other revenues to pay for those
20 costs from their core businesses.

21 The webcasting businesses for which we're
22 setting royalties here today is not the adjunct, the

1 minor adjunct to some other core business. In fact, I
2 think that reflects part of his concerns about, oh,
3 well, there are all these other revenue sources for
4 webcasters. He's trying to look at other businesses
5 and trying to come up with some theory that those
6 other businesses' revenues should be considered here,
7 when, in -- especially in this webcasting services
8 agreement, especially in connection with Sirius/XM,
9 the clear testimony is that these parties would agree
10 to higher royalty rates, to continue streaming,
11 because they can't leave the industry because they
12 recognize that they are a -- the competitive nature of
13 the industry, that people are -- that it's a potential
14 competitor in the future. They can't just abandon
15 this industry. But, yet, they would be willing to
16 take lower returns because it's not their core
17 business.

18 In addition, we've presented all sorts of
19 evidence about how broadcasters can more easily pay
20 these royalties and XM/Sirius. They already have
21 sales teams. They already have built-in relationships
22 with advertisers, especially for the broadcasters,

1 they have connections with local advertisers who
2 provide the bulk of the advertising revenue for
3 broadcasters and for their local streams, so they
4 don't have to go out and use the kinds of sales
5 representatives that webcasters have to use and pay
6 exorbitant royalty rates -- exorbitant commission
7 rates.

8 In fact, that leads me to another point in
9 that we heard nothing from Mr. Handzo today about the
10 state of the webcasting industry generally.

11 When I started the opening statement that I
12 made in April, on the first day of trial, I quoted
13 Mr. Handzo from his opening statement from the Web II
14 case that said -- quoted Mr. Brynjolfsson, or
15 Dr. Brynjolfsson, stating that, if business had gotten
16 better, then the rate should go up. If business has
17 gotten worse, the rate should go down.

18 And we heard nothing from Mr. Handzo here
19 this morning about the actual business of webcasting.
20 And in fact, when you look at the state of the
21 industry, I think you'll see that any analysis of the
22 state of the industry does not support a conclusion

1 that the business has gotten better in the webcasting
2 industry since your decision in the Web II case.

3 You'll see evidence that there has been a
4 decline in CPMs, the advertising rates that webcasters
5 are able to command in the marketplace. That
6 advertising sellout rates, the percentage of their
7 advertising that webcasters are able to sell in the
8 marketplace has decreased.

9 You'll see ample evidence that there's
10 abundant excess ad inventory, further driving down CPM
11 rates, making webcasters rely on third parties, ad
12 networks that go out and charge webcasters as much as
13 40 percent commissions on the advertising that they
14 sell.

15 You'll see that listener growth has begun to
16 flatten. That, really, all of the growth in the
17 marketplace has been attributable to essentially one
18 webcaster in the last several years.

19 And most importantly, you'll see that the
20 growth in a metric that's not even addressed in the
21 proposed findings or the reply findings of
22 SoundExchange, revenue per performance, which is the

1 key metric in assessing what webcasters would agree to
2 in a willing buyer/willing marketplace when you're
3 setting a royalty that's based on a royalty per
4 performance. It's not even addressed by
5 SoundExchange. Yet, we have demonstrated that
6 webcasters are not able to pay at the rates that are
7 suggested by SoundExchange.

8 Even in light of the clear evidence that the
9 industry has not been in a state of growth in terms of
10 its revenue per performance. That CPMs, the most
11 direct evidence that we have of that metric, are going
12 down. We still see rates that are proposing to go up.

13 CHIEF JUDGE SLEDGE: Mr. Oxenford.

14 MR. OXENFORD: Yes.

15 CHIEF JUDGE SLEDGE: Your comment on the
16 general industry and specifically on listenership, the
17 findings that you presented show substantial increases
18 in listenership for all years except for '08 and '09.
19 And '08 to '09 is flat.

20 MR. OXENFORD: Correct.

21 CHIEF JUDGE SLEDGE: So when you say that
22 the listenership is flat, you're ignoring all the

1 years before '09 and making that statement based only
2 on the figures for '09; is that correct?

3 MR. OXENFORD: Your Honor, what I intended
4 to say, and perhaps I didn't say it, was flattening as
5 opposed to flat. Because I know that you raised that
6 question.

7 But what the evidence clearly does show is
8 that any growth that exists in that marketplace is due
9 to the growth of a single webcaster, Pandora. And
10 Dr. Pelcovits, when Judge Wisniewski asked him to
11 compare the curves, admitted that the growth in the
12 last several years has been due to one webcaster,
13 Pandora.

14 JUDGE WISNIEWSKI: But, Mr. Oxenford, the
15 data that you presented that Judge Sledge is referring
16 to, that was the chart that I think had 5 or 6 years
17 worth of information.

18 MR. OXENFORD: Correct.

19 JUDGE WISNIEWSKI: Essentially looked like a
20 step-wise function where you had several periods that
21 you could define as flattening the way that you define
22 the last 2 years.

1 MR. OXENFORD: Correct.

2 JUDGE WISNIEWSKI: So how does that show
3 anything?

4 MR. OXENFORD: Well, but again, even -- even
5 if I'm wrong, even if I'm totally wrong and listening
6 is increasing, we have not shown that the ability to
7 monetize on a per listener basis -- and I used the
8 word "monetize," I apologize -- the ability to bring
9 in revenue at a per performance basis has been
10 increasing.

11 Again, look at CPMs, the figures are all
12 showing that they're dropping. Even Dr. Pelcovits
13 agreed that the CPM rates are either flat or
14 declining.

15 JUDGE WISNIEWSKI: Over what period do we
16 have to show that? Are you asking us now to also get
17 into the whole notion of forecasting over the next
18 5 years?

19 MR. OXENFORD: I'm not. In fact the revenue
20 models that we're looking at are the revenues for the
21 current period. Even Dr. Pelcovits's revenue models
22 that he's looking at --

1 JUDGE WISNIEWSKI: But we're setting rates
2 for 5 years, aren't we?

3 MR. OXENFORD: We are. We are. And in
4 fact --

5 JUDGE WISNIEWSKI: Why should we base that
6 on just the -- what may have happened in the past
7 year?

8 You would agree that the past year has not
9 been the best year for the economy as a whole,
10 wouldn't you?

11 MR. OXENFORD: No question. Except that
12 these trends that we have shown in terms of declining
13 CPM rates and declining sellout rates were not ones
14 that simply took into account the last year. It's
15 been declining CPM rates for several years. It's been
16 increasing reliance on advertising network because of
17 excess inventory that are taking ever larger
18 commissions, again over several years.

19 JUDGE WISNIEWSKI: And what evidence can you
20 point to that shows that that is, number 1, a trend,
21 but secondly, that the trend would continue throughout
22 the period of the license?

1 MR. OXENFORD: Even Dr. Pelcovits, in taking
2 his analysis of what the marketplace is, looks at a
3 benchmark of what the reality is today. Now,
4 Dr. Fratrik -- and we were criticized in Dr. Fratrik's
5 model for using the ZenithOptimedia revenue model,
6 which was more optimistic, double what AccuStream
7 suggested.

8 Dr. Fratrik said that the reason that he
9 used that most optimistic revenue model was because it
10 would allow for industry growth. So we have taken
11 that into account in the models that we've presented
12 to the Court.

13 JUDGE WISNIEWSKI: I fail to see that. I'm
14 sorry. I fail to see that. You're going to have to
15 give me something more persuasive because I fail to
16 see that in the evidence you presented.

17 MR. OXENFORD: Dr. Fratrik said that in
18 his --

19 JUDGE WISNIEWSKI: Where did Dr. Fratrik
20 show rates of growth through 2015?

21 MR. OXENFORD: Well, we're not -- I'm not
22 asking that we project the rates of growth through

1 2015.

2 JUDGE WISNIEWSKI: That was the question
3 that I had asked you.

4 MR. OXENFORD: Okay.

5 JUDGE WISNIEWSKI: But, yet, you seem to be
6 indicating that that is what we should be doing.

7 MR. OXENFORD: What I'm suggesting is that
8 the current rates, if we're looking -- the current
9 performance of the industry is not one that's been
10 increasing. It's not one that's on an upward
11 trajectory. And while I don't ask that you set rates
12 based on predictions as to what the future will bring,
13 I do ask that you look at the state of the industry to
14 determine whether it's reasonable to set rates that
15 continue higher, which can only be set on the
16 assumption that the business will be increasing, and
17 we have no evidence that the business will be
18 increasing, that the ability to pay royalties at an
19 even higher rate will be there in the marketplace.

20 JUDGE WISNIEWSKI: Okay. And in terms of
21 the standard that governs this proceeding, the way
22 that you relate that back is to say that there would

1 be no willing buyer --

2 MR. OXENFORD: Exactly.

3 JUDGE WISNIEWSKI: -- under those
4 circumstances.

5 MR. OXENFORD: Exactly. There would be no
6 willing buyer. In fact, again, we show, both
7 Dr. Salinger and Mr. Smallens did computations to show
8 that the most successful webcaster in the marketplace
9 would not -- would be paying essentially 100 percent
10 of its revenues to SoundExchange even at the current
11 royalty rate, much less the royalty rates that are
12 proposed by SoundExchange going forward.

13 Now, Mr. Handzo criticizes the revenue
14 figure that we used for Pandora that was widely
15 reported in the press. Yet, Mr. Smallens on his
16 direct examination was asked, did you have other
17 sources to confirm that. He said, yes, from evidence
18 produced in this proceeding, from the discovery
19 produced in this proceeding by SoundExchange.

20 So it's not just a number made up out of the
21 air. That the most successful webcaster, that even
22 Dr. Pelcovits holds up as the most successful

1 webcaster, would be paying 100 percent of its revenues
2 as royalties under the current royalty rate, much less
3 the increased royalty rates that Dr. Pelcovits
4 suggests.

5 CHIEF JUDGE SLEDGE: Is there any difference
6 between the characterization you've made about excess
7 advertising inventory causing higher commissions
8 because of reliance on networks, and the lower CPMs
9 from the state and terrestrial market where the
10 advertising rates for peak times greatly exceed the
11 advertising rates for late night and nonpeak times?

12 It would appear that, as listenership goes
13 up, then you're going to have a lot of transmission
14 occurring in nonpeak time. And as listenership of
15 nonpeak time goes up, then your nonpeak rates are
16 going to be applying to a greater percentage of the
17 advertising revenue.

18 So why -- what is different there in this
19 argument than what has always been true in the
20 terrestrial market?

21 MR. OXENFORD: Well, Judge Sledge, that's
22 exactly our argument, is that there is a lot of

1 nonpeak, as you say, listening here. But we're paying
2 the same rates for all of that listening that we're
3 paying for the peak listening.

4 CHIEF JUDGE SLEDGE: Because you choose to
5 stream during nonpeak times.

6 MR. OXENFORD: But it's not -- in the
7 webcasting world, the peak is not hours. The peak may
8 be demographics. The peak may be location. We've
9 heard lots of testimony from SoundExchange about, oh,
10 well, sooner or later, webcasters will be able to make
11 more money because they can reach particularly
12 targeted markets. They can reach particular
13 demographics.

14 But the only way that you can provide enough
15 mass to reach those targeted markets is by streaming a
16 lot. And the problem is, yes, you may be able to get
17 some premium rates by reaching males in Cincinnati;
18 but for a webcasting service to reach enough males in
19 Cincinnati to interest an advertiser, you've got to
20 stream a whole lot of time to females in Oshkosh and
21 children in Texas.

22 You know, it just -- there is a lot of

1 streaming that goes on that just can't be monetized.

2 Yet, we have to pay the royalties.

3 That was the import of Mr. Smallens'
4 testimony. That there was lots and lots of streaming
5 that goes on in order to be able to provide the
6 demographics, provide the numbers that advertisers are
7 looking for.

8 But, yet, what we're being asked by the
9 SoundExchange proposal is to value all of that time as
10 if it is premium time, as if it is being created at
11 the highest possible level at which revenue comes in,
12 the revenue from a subscription model.

13 CHIEF JUDGE SLEDGE: So you're benefiting
14 from having higher listenerships because you can go to
15 buyers of advertising and show higher numbers.

16 And to get those -- and to have those higher
17 listenerships, you're using music -- to get that
18 higher listenership, you're using copyright content.

19 MR. OXENFORD: Correct.

20 CHIEF JUDGE SLEDGE: Yet, you're arguing
21 that you don't want to pay for using that at the
22 rate -- at a rate that has been established to this

1 point. And, yet, but you want the benefit from it.

2 MR. OXENFORD: What we're arguing is that a
3 webcaster would only pay a rate at which it can pay
4 its cost and make a return. No willing buyer is going
5 to engage in a business in which they can't pay their
6 costs and make some sort of return.

7 And it's -- all the testimony is that
8 webcasters have to stream to folks that they can't
9 make a lot of money from. That -- but we're still
10 paying on a per performance basis the same rate for
11 every one of those songs that stream to every one of
12 those listeners, even though we're not able to
13 monetize each one.

14 The analogy that Dr. Salinger used, it's
15 like an airline. Yes, the airline would love to fly
16 nothing but first class seats with customers paying
17 first class rates. But you can't do that. You also
18 have to fill up the airplane with folks paying coach
19 rates.

20 Essentially, it's -- it's the same thing
21 here. Yes, we would love to be selling only
22 subscription services or only some high CPM that we

1 can get for a specific niche market. But to be able
2 to provide those CPMs, to be able to provide that
3 aggregated audience, you have to provide a lot of
4 other audience. And when you do the blended rate for
5 all those performances, it's not at a rate that can be
6 paid at the royalties that SoundExchange suggests.

7 And that's in essence our criticism of
8 Dr. Pelcovits's proposal. That his proposal doesn't
9 model the industry as it is. It models the industry
10 as if it was all premium services, subscription
11 services. Dr. Salinger presented a different model,
12 or took Dr. Pelcovits's model and included advertising
13 revenue.

14 What was Dr. Pelcovits's reasoning for not
15 doing it? He said it was hard to figure out what the
16 proper rates to be used in the attributing revenue to
17 advertising-supported streams. But, yet, you know,
18 Dr. Salinger was able to do it and come up with a
19 lower royalty rate.

20 Now, certainly, Mr. Handzo criticizes his
21 assumptions, whether he used AccuStream or
22 ZenithOptimedia. But even if he used the

1 ZenithOptimedia numbers, it still comes in well below
2 what SoundExchange is proposing as their royalties.

3 So, you know, we can't credit a regression
4 analysis that only takes into account a marketplace
5 that essentially doesn't exist, a pure subscription
6 marketplace.

7 The only evidence that we have of any
8 webcaster who is out there that is just a pure
9 subscription statutory webcaster is XM/Sirius. And,
10 again, that's only in a situation where this is an
11 adjunct of another business that they're already in,
12 where, as Dr. Ordovery said, they would be willing to
13 take few, if any, profits just to support the business
14 from which they make all their money, their satellite
15 service.

16 CHIEF JUDGE SLEDGE: And the webcasters make
17 business decisions to increase the royalties they pay
18 in order to get higher listenership. They have the
19 option to decrease the royalties they pay and thereby
20 decrease their listenership and tailor their
21 listenership to peak times versus nonpeak times.

22 MR. OXENFORD: Your Honor, I don't think

1 there is any evidence in the record that says that is
2 a real option for webcasters, that a webcaster can
3 operate a successful business only by streaming to
4 those 18 to 35-year-old males in Cincinnati, or only
5 streaming to subscription customers. There's nothing
6 in the record that indicates that any webcaster could
7 operate that way without having the Sirius/XM
8 operation.

9 JUDGE ROBERTS: Is that --

10 CHIEF JUDGE SLEDGE: Well, and that's -- and
11 that fits with what you're saying, what you're
12 complaining about. You're saying that we don't -- we
13 shouldn't have to pay peak rates for streaming when
14 we've decided industry-wide to peak -- to stream all
15 the time and in nonpeak times.

16 MR. OXENFORD: But --

17 CHIEF JUDGE SLEDGE: You're arguing against
18 your very argument.

19 MR. OXENFORD: I don't -- respectfully, Your
20 Honor, I don't believe I am. I'm trying to make the
21 point that you simply cannot stream solely to those
22 peak audiences. Whether they be a particular

1 demographic, a particular time, or a subscription only
2 audience. There's nothing in the record that
3 indicates a successful webcaster, webcaster standing
4 alone, can do that. There's nothing in the record.

5 CHIEF JUDGE SLEDGE: Judge Roberts, I
6 interrupted you.

7 JUDGE ROBERTS: That's all right. Is that
8 because you're a national service as opposed to a
9 regional service? Isn't that why you don't -- you
10 know, when we talk about a broadcaster and maybe a
11 broadcaster streaming, most of the listenership is
12 probably within the region. But in the instance of
13 Live365, you're a national service.

14 MR. OXFORD: Right, but --

15 JUDGE ROBERTS: So you don't really have a
16 peak time, do you?

17 MR. OXFORD: Exactly.

18 JUDGE ROBERTS: Okay.

19 MR. OXFORD: And I think, again, peak --
20 the time question for webcasting isn't as relevant. I
21 mean, the peak time --

22 JUDGE ROBERTS: As it is for broadcasting.

1 MR. OXENFORD: -- versus the demographics
2 and the method of streaming, it's a different kind of
3 peak. It's not hours. It's the type of audience
4 where you get the higher CPMs, not necessarily the
5 hours.

6 JUDGE ROBERTS: Okay.

7 MR. OXENFORD: And, in fact, to further
8 address this point, even SoundExchange's witnesses
9 have testified that setting the rates at the highest
10 possible level is not the appropriate level to set
11 them at. What you're looking for is a profit
12 maximizing rate. And it may be lower than that
13 highest level because you'll get more total revenue
14 from more streaming done at a lower level than at that
15 absolute highest royalty rate that somebody could
16 possibly pay for those peak times. If you've got more
17 listening paying a lower royalty, you'll actually
18 bring in more total revenue for the collective.

19 JUDGE WISNIEWSKI: Well, that depends on the
20 elasticity of demand, doesn't it?

21 MR. OXENFORD: It does. It does. But --

22 JUDGE WISNIEWSKI: And you haven't any

1 evidence to show that --

2 MR. OXENFORD: Nor does SoundExchange.

3 JUDGE WISNIEWSKI: -- in the record.

4 MR. OXENFORD: Nor does SoundExchange.

5 JUDGE WISNIEWSKI: Why make the argument if
6 you have no evidence?

7 MR. OXENFORD: Well, it's SoundExchange who
8 is offering this royalty rate set at the highest
9 level, the subscription royalty level, from
10 Dr. Pelcovits. Dr. Pelcovits never tried to figure
11 out what the appropriate royalty maximization rate.
12 Mr. Kooker never bothered to figure out what the
13 profit maximization rate. And Mr. McCrady said that
14 he never bothered to figure out what the profit
15 maximization rate is.

16 Yet they're all asking for a royalty in
17 Dr. Pelcovits's model to be based on the highest
18 possible use of webcasting on a subscription basis.

19 And, again, that -- even their witnesses
20 agree that they should be looking at a profit
21 maximizing model. But they never did.

22 Now, Mr. Handzo also was up here saying

1 that, oh, well, Live365 can pay those rates that were
2 suggested by Dr. Pelcovits's model. They're
3 profitable. We've created a chart, effectively, he
4 refers to numbers that were shown in their findings
5 and conclusions, that show that we would be profitable
6 at every year except the fifth year.

7 A couple of criticisms about that. First of
8 all, we've never been here to present a royalty rate
9 that would apply exclusively to Live365. That's not
10 our job. That's obviously not your job. We're here
11 to set a royalty rate that a willing buyer and a
12 willing seller would agree in the marketplace that you
13 characterized in Web II, citing Web I. The rate that
14 most webcasters would be paying in a willing
15 buyer/willing selling market.

16 So we're not focusing exclusively on
17 Live365, which they seem to be holding out as saying
18 that it's much more profitable.

19 Secondly, we've shown in our reply findings
20 that the chart that they've created that shows we will
21 be profitable at every level doesn't really show that
22 they will be profitable at every level. They've never

1 presented that evidence in the courtroom. They never
2 gave anybody an opportunity to cross-examine anyone as
3 to how that chart would be created. It was a
4 mathematical computation of, I don't think it was
5 Mr. Handzo, but presumably someone in his office, that
6 simply is not right.

7 First of all, I mean, I don't want to tire
8 you with all the criticisms because they're set out in
9 our reply findings to that specific chart, but things
10 like our fiscal year is a different fiscal year. So
11 that numbers that were attributed to performances in a
12 particular fiscal year failed to recognize that a lot
13 of those performances actually took place in the prior
14 calendar year at a lower royalty rate, so there are
15 actually more performances, meaning that the numbers
16 just aren't right.

17 They ignore the fact that that chart doesn't
18 take into account anything to do with capital
19 expenses, depreciation, amortization, rate of return.
20 Instead, they say, even with all these errors, hey, we
21 make a whole 19, I think it's \$19,000 next year at the
22 statutory royalty rate. Wow, \$19,000. When, again,

1 we show that the most successful webcaster in the
2 industry would be paying 100 percent of its revenues
3 at the rates that they suggest.

4 Now, let's talk a little bit about
5 Dr. Fratrik's analysis. And, again, Mr. Handzo keeps
6 talking about how we held out Live365 as a typical
7 webcaster. That we use Live365's data for revenue and
8 faults us for not including the revenue from the other
9 line of businesses that provide services that other
10 companies are out there selling in the marketplace,
11 achieving revenues, for providing these technical
12 back-end services, not having anything to do with
13 music.

14 But even if we excluded them, it doesn't
15 make any difference because that's not where we got
16 the revenue used in the model that Dr. Fratrik
17 analyzes. That -- as Mr. Handzo said, that revenue
18 figure came from ZenithOptimedia as an industry-wide
19 revenue data. So the fact, whether or not we include
20 anything from Live365's revenue data is completely
21 irrelevant, because that's not the basis of the model
22 that Dr. Fratrik came up with for adducing what the

1 royalties that a representative webcaster would pay.
2 Not for what Live365 would pay, but for what a
3 representative webcaster would pay.

4 Now, Mr. Handzo says, oh, well, Dr. Fratrik
5 hasn't justified the subscription revenues that would
6 be coming in. Yet, in fact, as we point out again in
7 our reply findings, the number that Dr. Fratrik uses,
8 slightly over \$6 for per subscriber revenue, is
9 actually higher than the per subscription number that
10 Dr. Pelcovits came up and used in his model by about a
11 dollar and a half. Again, it's a benefit to
12 SoundExchange.

13 He, you know, criticizes us for other
14 numbers, that he hasn't suggested that there are any
15 better numbers out there. The Live365 costs, which is
16 the only factor that is based exclusively on Live365's
17 costs, because we had no other cost data available in
18 the marketplace. There is no AccuStream or
19 ZenithOptimedia from which to get cost data for
20 webcasters. It's not reported to SoundExchange in the
21 documents that we were able to discover.

22 We relied on Live365, as a company that's

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1 been webcasting for a decade, as having representative
2 costs for what a webcaster would incur in the
3 marketplace.

4 And he's -- sure, he's critiqued us for our
5 choice of what to include in costs and what not to
6 include in costs. But if we included all of those
7 other costs from the other part of the business, from
8 the other part of the Live365 business, that would
9 actually raise the costs, lowering the costs per
10 performance, again, would have resulted in a lower
11 projected royalty rate, giving a benefit to
12 SoundExchange.

13 In essence, where Dr. Fratrik is being
14 criticized, the errors redound to the benefit of a
15 higher royalty, not a lower royalty.

16 Now, Mr. Handzo said, oh, well, Live365
17 wouldn't be earning a 20 percent rate of return on the
18 services that it provides in -- using this model and
19 its current revenue and royalty rates. That's true.
20 And we don't doubt that.

21 But what Live365 witnesses have testified is
22 that they've cut back on streaming. Their

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1 performances have gone down because they are concerned
2 about the royalty rates. They've cut back on hiring.
3 They're paying lower salaries than otherwise would
4 take place in the marketplace, in hopes that they can
5 get a royalty rate that would allow them to expand
6 their businesses going forward and eventually earn
7 that 20 percent rate of return.

8 Again, we're not setting a royalty that
9 presents this rate of return for Live365. We're
10 setting one for what most webcasters would be willing
11 to pay in -- as a willing buyer/willing seller
12 marketplace -- in a willing buyer/willing seller
13 marketplace transaction. So the fact that this
14 particular webcaster would not earn that rate
15 doesn't -- shouldn't be of concern.

16 Now, Mr. Handzo also says, oh, the
17 20 percent rate of return, that's not a figure that we
18 can rely on. There are all these other webcasting
19 businesses that have rates of return that are far
20 smaller. Yes, all these other Internet businesses
21 that have rates of return in the single digits are
22 ones that have high warehouse inventory costs, Amazon,

1 one of the flower services, people that actually have
2 to have bricks and mortar, locations to store
3 inventory in, to deliver it.

4 We show in our reply findings that Google, a
5 content delivery Internet service, has a 35 percent
6 rate of return. Higher than what Dr. Fratrik uses
7 when he says let's use a 20 percent rate of return.
8 That's similar to other businesses that use audio
9 entertainment, that would be evaluated by investors
10 and bankers and businessmen in deciding whether to
11 enter into a particular line of business. It's a
12 comparable line of business and should have a
13 comparable rate of return.

14 SoundExchange's witnesses really do nothing
15 to rebut the --

16 JUDGE WISNIEWSKI: Mr. Oxenford, isn't rate
17 of return related to risk?

18 MR. OXFORD: Yes.

19 JUDGE WISNIEWSKI: What's that risk in the
20 Live365 or representative webcaster business that you
21 have proposed?

22 MR. OXFORD: The capital investment in

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1 starting a webcasting business.

2 JUDGE WISNIEWSKI: And how large is that
3 relative to costs and revenues of the business?

4 MR. OXENFORD: I know what it is for
5 Live365. Is it in the record? I mean, there are
6 millions of dollars invested in Live365. I'm just --
7 I would ask my team to see if there is a number that
8 they can provide me. But there are --

9 JUDGE WISNIEWSKI: I guess the question is,
10 is it comparable to the kinds of investment risks that
11 these other companies that you were just talking about
12 have?

13 MR. OXENFORD: Well, again, I think it is.
14 And, I think it's --

15 JUDGE WISNIEWSKI: I thought you said that
16 the other companies had other things, many more things
17 that were more expensive that they had to invest in,
18 such as warehousing costs involved.

19 MR. OXENFORD: Well, yes. That is -- and I
20 should correct my statement. Yes, that is one factor
21 that you would look at is the costs of capital, of the
22 investment in the business. But there are other,

1 other factors that are involved in figuring rate of
2 return, including what comparable businesses achieve
3 in the marketplace. And, again, looking at the
4 comparable businesses, in the same type of business
5 that webcasters are, we don't believe that a
6 20 percent rate of return is unreasonable.

7 Now, the criticisms of Dr. Fratrik from
8 Dr. Ordoover don't provide a more appropriate rate of
9 return. And Dr. Pelcovits and Dr. Ordoover both agree
10 that a rate of return is proper. In the Web I case,
11 for a mature webcaster, Dr. Nagle, SoundExchange's
12 witness, said for a mature webcaster a royalty rate of
13 between 12 and 22 percent would be appropriate. And
14 we have, again, offered a figure.

15 JUDGE WISNIEWSKI: You just said royalty
16 rate.

17 MR. OXENFORD: I apologize. A rate of
18 return in the area that Dr. Fratrik has suggested
19 would be appropriate.

20 JUDGE WISNIEWSKI: That's what I thought you
21 meant.

22 MR. OXENFORD: Thank you. I appreciate any

1 help I can get.

2 JUDGE WISNIEWSKI: We just like to keep the
3 record straight.

4 MR. OXENFORD: Great. Dr. Ordover has not
5 suggested what an appropriate of return would be. He
6 has not suggested what an appropriate cost model would
7 be if we're wrong. He's not suggested that
8 subscription revenue numbers that he criticizes as not
9 being proper should be some other number.

10 He said, oh, that the ratio of subscription
11 to nonsubscription listeners, which Dr. Fratrik
12 confirmed from several sources, as stated in his
13 corrected written direct testimony, he's not --
14 Dr. Ordover has not offered any better number, just to
15 say, hey, these aren't good numbers. But anybody can
16 say hey, these aren't good numbers. Unless you can
17 offer something that shows these aren't the best
18 numbers, that these are somehow prejudiced in getting
19 a wrong number, as Mr. Handzo said here today, you
20 can't have perfection. You can work with the best
21 that you've got when you're doing economic modeling.
22 We've provided the best evidence that we have

1 available as to what the models -- as to what the
2 industry really reflects.

3 Now, we've also asked for a further -- well,
4 actually, Your Honor, if I may take a moment and
5 confer with my colleagues, I may give you that time
6 that -- you've asked us to be brief and give you some
7 time back here. Let me confer with my colleagues to
8 see if I have other points that I would want to make
9 here.

10 CHIEF JUDGE SLEDGE: Feel free.

11 MR. OXENFORD: If I could have a moment.

12 I think I would just like to make two other
13 points about some of the statements made by Mr. Handzo
14 this morning about the rate proposals of SoundExchange
15 in some of the questioning that went back and forth
16 about how that rate proposal was adopted.

17 Dr. Pelcovits's testimony is he doesn't know
18 how that rate proposal was adopted. He may know what
19 it was, but his testimony is he doesn't know how that
20 rate proposal was adopted, and where those .02 cent
21 increases in every year comes from. Dr. -- or
22 Mr. McCrady, the only SoundExchange witness who was

1 able to testify with respect to the litigation -- or
2 to the derivation of the rate proposal, said that it
3 was one that was derived as part of a litigation
4 posture. That essentially, in response to a question
5 about -- from Judge Wisniewski about the trajectory.
6 Yes, it just continued the trajectory of the rates
7 that you had adopted in the previous case, in Web II,
8 without any inquiry as to what the basis of that
9 trajectory was.

10 That essentially this is not a prediction
11 from the SoundExchange rate committee as to what a
12 willing buyer/willing seller would agree to, but it's
13 a number that came up as a result of a litigation
14 posture.

15 Mr. McCrady also says with respect to the
16 WSA settlement agreements, those reflect agreements
17 that were agreed to as part of the litigation posture.
18 That they again anticipate not what a willing
19 buyer/willing seller would agree to in the
20 marketplace, but their predictions as to what this
21 court would arrive at as a rate for webcasting, again
22 with the added benefit of, by making it precedential,

1 they would hopefully ensure that the rates that they
2 arrived at would become, in fact, precedential in the
3 rates this court arrived at.

4 CHIEF JUDGE SLEDGE: What is the problem
5 with a proposal being presented when witnesses say
6 that that proposal is reasonable?

7 MR. OXENFORD: I think the problem is that
8 we're not here to set a rate based on what business
9 people in a litigation posture determine is a rate
10 that they want to advance as part of a litigation
11 strategy, as opposed to rates arrived at in a business
12 context as to what a willing buyer or willing seller
13 would agree to as an economic consideration.

14 CHIEF JUDGE SLEDGE: What source do you have
15 for that view?

16 MR. OXENFORD: Well, again, your statement
17 in Web II that the rates that would be set are those
18 that a willing buyer and willing seller would agree to
19 in a hypothetical marketplace, the willing buyers
20 being most webcasters.

21 CHIEF JUDGE SLEDGE: All right. And if the
22 witness says that the rate -- that the proposed rate

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1 is reasonable under that standard, then what is the
2 objection?

3 MR. OXENFORD: But that's not what the
4 witness said. The witness said that these rates were
5 derived, not as what he believed to be reasonable as a
6 willing buyer, willing seller, but, instead as a
7 matter of litigation posture. Litigation --

8 CHIEF JUDGE SLEDGE: That's not what
9 Dr. Pelcovits said?

10 MR. OXENFORD: Well, Dr. Pelcovits did not
11 know how these rates had been developed.

12 CHIEF JUDGE SLEDGE: You're changing the
13 question.

14 MR. OXENFORD: Okay. I apologize, Your
15 Honor.

16 CHIEF JUDGE SLEDGE: The question is, what
17 is the problem with a proposal being presented --

18 MR. OXENFORD: Correct.

19 CHIEF JUDGE SLEDGE: -- when witnesses say
20 that the proposal is reasonable under the applicable
21 statutory standard?

22 MR. OXENFORD: What Dr. Pelcovits said is

1 that he would justify a rate that would be from .36
2 down to the .24 or 5 that's the average between the
3 two webcasters -- webcaster settlement agreement
4 agreements.

5 He did not specifically, I don't believe,
6 say that the rates that were proposed by SoundExchange
7 were reasonable. I believe he testified he knew what
8 they were. But I don't believe he said they were
9 reasonable.

10 CHIEF JUDGE SLEDGE: He said as long as it
11 was within that range, it was reasonable.

12 MR. OXENFORD: That's correct. He said a
13 rate within that range. We've argued that that range
14 is not a reasonable range, because it only takes into
15 account the high-priced seats, that the webcaster
16 settlement agreements don't --

17 CHIEF JUDGE SLEDGE: That's a different
18 issue again.

19 MR. OXENFORD: Yes, it is. Also, just to
20 make the point, Dr. Pelcovits, in confirming his
21 analysis, in the regression analysis that Mr. Handzo
22 has chosen not to address, when you look at the

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1 standard error there, it would justify rates that were
2 many times many multiples of what Dr. Pelcovits had
3 suggested, down to rates that were a percentage of
4 what Live365 presented.

5 So, you know, his confirmation as to where
6 that range of rates would lie is a very broad range of
7 rates.

8 For that reason -- for those reasons, Your
9 Honor, based on the fact that we're in a business that
10 has to be able to make a rate of return, that all
11 parties to this case have conceded, a webcaster has to
12 make a rate of return. A webcaster has to be able to
13 operate a successful business. A willing
14 buyer/willing seller model predicts an economic
15 transaction, not one that's a transaction to subsidize
16 other lines of business, but an economic transaction
17 for webcasting.

18 At the evidence that's been provided, the
19 industry just does not achieve the level of
20 profitability on a per performance basis that's
21 necessary to pay the royalties that are suggested by
22 SoundExchange, or even to pay the royalties that were

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1 suggested -- that were predicted to be appropriate
2 under the Web II case.

3 Again, pointing to Mr. Handzo's statements,
4 that the business is decreasing, the rates should go
5 down. If the business is increasing, business is
6 getting better, the rates should go up.

7 There's nothing in the record to indicate
8 that the business is getting better for webcasters
9 that would justify those rates going up.

10 It's just common sense that a willing buyer
11 and willing seller would agree to royalty rates that
12 would be appropriate to reflect the marketplace
13 realities.

14 So I ask that you accept the royalty rate
15 suggested by Live365. Thank you.

16 JUDGE ROBERTS: Before you sit down.

17 JUDGE WISNIEWSKI: Yes, before you sit down.

18 MR. OXENFORD: Oh, okay.

19 JUDGE ROBERTS: I do have some -- a few
20 questions for you.

21 MR. OXENFORD: Yes.

22 JUDGE ROBERTS: I think, when you paused and

1 consulted with your counsel, by judging from your
2 words, you were going to say something about the
3 aggregator discount. At least that's what I gathered
4 you were starting to say.

5 I noticed in looking at your proposed
6 findings of fact and conclusions of law that that
7 discount appears in the terms provision.

8 MR. OXENFORD: Yes.

9 JUDGE ROBERTS: So are you proposing it as a
10 term or as a rate?

11 MR. OXENFORD: Well, Judge Roberts, I hadn't
12 really stopped to think about the difference between
13 the rates and terms in this case. I guess I'm
14 proposing it -- we're proposing it as a -- as a rate
15 because it is a proposal for a lower rate for a party
16 that achieves -- that fits within the model that we're
17 proposing.

18 So I would think that that was an error to
19 put it in the terms section in our discussion.

20 JUDGE ROBERTS: Okay. So it should be a
21 rate.

22 MR. OXENFORD: Yes.

1 JUDGE ROBERTS: Now, with respect to your --
2 and you've discussed in depth your viewpoint about the
3 value of, in particular, the SoundExchange/NAB
4 agreement. And I understand your arguments about how
5 that's not representative --

6 MR. OXENFORD: Yes.

7 JUDGE ROBERTS: -- of the hypothetical
8 marketplace.

9 But I notice in your proposed findings, with
10 respect to the aggregator discount, you offer up the
11 agreements that Live365 has with the PROs.

12 MR. OXENFORD: Correct.

13 JUDGE ROBERTS: And say this serves as a
14 good example of why there should be an aggregator
15 discount.

16 But if we're looking at the hypothetical
17 marketplace, Live365 is representing a number of
18 services. The PROs are representing thousands and
19 thousands of different copyright owners of musical
20 works. Doesn't that suffer from the same deficiency
21 in the hypothetical -- looking at the hypothetical
22 marketplace, that we would be looking at the wrong

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1 buyer and the wrong seller if we were to follow what
2 you are suggesting?

3 MR. OXENFORD: Actually, I think the buyer
4 is the same buyer. It's essentially, in the
5 agreements that we discussed, services that are using
6 Live365 as a platform.

7 JUDGE ROBERTS: Yes. But you're viewing it,
8 though, from Live365's point of view.

9 MR. OXENFORD: Correct.

10 JUDGE ROBERTS: And Live365 did the
11 negotiating with the PROs.

12 MR. OXENFORD: It did, yes.

13 JUDGE ROBERTS: Not the services themselves
14 that are on Live365.

15 MR. OXENFORD: That's correct.

16 JUDGE ROBERTS: And then certainly on the
17 buyer's side, excuse me, the seller's side, with the
18 PROs, you have three organizations, three PROs,
19 representing an enormous amount of copyright owners of
20 musical works.

21 MR. OXENFORD: Correct.

22 JUDGE ROBERTS: So there too, you don't

1 have, in the hypothetical marketplace, the services
2 and the copyright owners.

3 So if you don't have it in that context, why
4 should you be advocating to us that that's what we
5 should be looking to, but at the same time we
6 shouldn't look to the NAB/SoundExchange agreement
7 because of its deficiency in the hypothetical
8 marketplace?

9 MR. OXENFORD: Because the economics of the
10 transactions in the aggregator situation are
11 comparable to the economics that we're asking for
12 here.

13 The economics that are recognized by the
14 agreements --

15 JUDGE ROBERTS: I'm not asking you, though,
16 about economics. I'm asking you about who is the
17 willing buyer and who is the --

18 JUDGE WISNIEWSKI: Hold that thought.

19 MR. OXENFORD: Okay. I'm sure you will ask
20 about the economics.

21 JUDGE ROBERTS: But I'm asking about the
22 willing buyer and the willing seller. And it seems

1 that, in advocating the PRO agreements, we have the
2 same problem that you identify that we have with
3 respect to SoundExchange negotiating on behalf of all
4 the record companies and the NAB negotiating on behalf
5 of all the broadcasters.

6 So again, my question is why is it okay to
7 look at the PRO agreements, and that's okay in the
8 willing buyer/willing seller hypothetical marketplace,
9 but it's not in the marketplace with respect to the
10 NAB/SoundExchange?

11 MR. OXENFORD: Well, again, looking at the
12 agreements as a whole, the NAB, the WSA settlement
13 agreements, beyond the fact that they're not between
14 the same parties, also have lots of other deficiencies
15 that just don't make them applicable. They're
16 agreements that were entered into under the shadow of
17 litigation. They're agreements that gave benefits to
18 broadcasters, such as lower royalty rates in the
19 years -- there's a whole range of factors that just
20 make them completely inapplicable as a benchmark.

21 You know, if the only --

22 JUDGE ROBERTS: Again, I understand the

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1 other arguments. But I -- I'm focused on this one
2 argument that you make with respect to what the
3 deficiency is with the SoundExchange/NAB agreement.

4 MR. OXENFORD: If the agreements had been
5 offered, the WSA agreements, and had none of these
6 other problems, the only problem was they weren't the
7 same buyer and seller --

8 JUDGE ROBERTS: Right.

9 MR. OXENFORD: -- and appropriate
10 adjustments had been made for whatever other factors
11 were placed -- involved in that transaction, maybe
12 they would have some instructive value as to a royalty
13 rate for this proceeding.

14 But it's the litany of problems that -- with
15 those agreements, that just don't make them comparable
16 to the rates that we're trying to arrive at here.

17 With these aggregator agreements, with the
18 PROs, essentially what we're talking about is cost
19 savings, which SoundExchange's own witnesses
20 testified, yes, there are cost savings involved by
21 having one reported use, by having one party
22 responsible for paying all the royalties rather than

1 all these other parties, just like there are in the
2 PRO. The actual transaction is essentially the same
3 transaction that we're talking about in those two
4 cases.

5 While the WSA agreements, there are just so
6 many differences that are cited in our reply findings,
7 that are cited in our original findings, that just
8 make those WSA agreements totally inapplicable as
9 benchmarks for this proceeding.

10 JUDGE ROBERTS: Okay. There may be other
11 questions on aggregator discount. I have another
12 question about one of your terms. So I'm going to
13 wait to ask that.

14 JUDGE WISNIEWSKI: Okay. Let me follow up,
15 then, on the PRO agreement that you were just talking
16 about --

17 MR. OXENFORD: Sure.

18 JUDGE WISNIEWSKI: -- with Judge Roberts.

19 Isn't it true that, in that PRO agreement,
20 the copyright owners get the benefit of the discount?
21 It doesn't go to the PRO? They don't get the money,
22 do they?

1 MR. OXENFORD: The copyright owners get the
2 benefit of the discount? I'm not sure what you're
3 asking.

4 JUDGE WISNIEWSKI: Well, who was the PRO
5 representing in that negotiation?

6 MR. OXENFORD: The PRO was representing the
7 copyright owners.

8 JUDGE WISNIEWSKI: Exactly. And don't they
9 get the benefit of that discount?

10 MR. OXENFORD: Well, the benefit of the
11 discount is the webcasters. They get a 20 percent
12 discount off of the normal rates that would be paid to
13 the copyright owners.

14 JUDGE WISNIEWSKI: Okay. I guess -- I guess
15 I'm not stating it correctly here.

16 Let me go to the point. Who gets the
17 benefit of the discount that you're proposing?

18 MR. OXENFORD: Live365, who is paying the
19 royalties for the webcasters.

20 JUDGE WISNIEWSKI: Is Live365 the licensee?

21 MR. OXENFORD: For purposes of the
22 SoundExchange royalty, yes, it is.

1 JUDGE WISNIEWSKI: But your proposed
2 regulations don't state that. If you look at your
3 proposed regulations, you say that the aggregator
4 discount goes to the qualified webcast aggregation
5 service.

6 MR. OXENFORD: Yes. And the qualified
7 webcast service is one who aggregates programming
8 from -- and I don't have the terms right in front of
9 me.

10 JUDGE WISNIEWSKI: Well, I have the other
11 definitions that you have listed here. It says the
12 webcast aggregation service is a streaming service
13 that operates a network of at least 100 independently
14 operated aggregated webcasters.

15 MR. OXENFORD: Correct.

16 JUDGE WISNIEWSKI: Okay. If we look to the
17 definition of aggregated webcasters, it says that it
18 means that it's an individual business organization or
19 other legal entity that individually streams less than
20 100,000 ATH per month of royalty-bearing performances
21 and utilizes a webcast aggregation service.

22 Isn't the fact that if you say that this is

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1 a webcaster who streams, they are in fact the
2 licensee?

3 MR. OXENFORD: I believe that the
4 regulations that we provided with our findings and
5 conclusions make it clear that Live365, the
6 aggregator, would be the licensee responsible for the
7 royalties.

8 JUDGE WISNIEWSKI: They do not. That's why
9 I'm raising the question.

10 MR. OXENFORD: Okay.

11 JUDGE WISNIEWSKI: And I've raised it
12 throughout this proceeding. What you have here is
13 essentially an amount of money going to someone who
14 calls itself a webcast -- qualified webcast
15 aggregation service, but is not in fact the party who
16 streams, and, therefore, is not the licensee the way
17 these regulations are constructed. That's how I read
18 them.

19 MR. OXENFORD: Well --

20 JUDGE WISNIEWSKI: And if they don't say
21 that, then they certainly at least say that both that
22 service and the aggregated webcaster stream, and

1 therefore both would be licensees.

2 MR. OXENFORD: Judge Wisniewski, I'll need a
3 moment to look at these. I'll, if I could, address
4 this in my reply. I don't believe that that's what it
5 says, but you certainly do. I would need to just
6 parse each sentence. And rather than standing here
7 trying to do that, perhaps I can address it in
8 whatever time I have left in --

9 JUDGE WISNIEWSKI: Well, then tell me this.
10 At least as you understand it, who gets the money?
11 Who gets the discount?

12 MR. OXENFORD: Live365 is paying the
13 royalties, so they would pay a lesser amount, or any
14 other qualified aggregator who brings together 100
15 independently operated programming services from
16 webcasters.

17 JUDGE WISNIEWSKI: And, therefore, those
18 programming services do not get the benefit of that?
19 Do those programming services, for example, pay a
20 royalty fee?

21 MR. OXENFORD: They would not be paying a
22 royalty fee to SoundExchange.

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1 JUDGE WISNIEWSKI: So they would simply be
2 one licensee?

3 MR. OXENFORD: Correct. One licensee.

4 JUDGE WISNIEWSKI: In your understanding of
5 this.

6 MR. OXENFORD: Oh, no question. That is our
7 proposal. That there be a single licensee. That
8 licensee would be Live365. Live365 would be
9 responsible for the payment of the royalties. And if
10 they meet the criteria that we've set out, they would
11 be entitled to a discount.

12 CHIEF JUDGE SLEDGE: Where in your proposed
13 regulations is there an exemption for licensees who
14 are customers of Live365 not to pay royalties?

15 MR. OXENFORD: Well, the party who is
16 actually streaming the service to the customer is
17 Live365.

18 JUDGE WISNIEWSKI: But your definition
19 doesn't say that.

20 CHIEF JUDGE SLEDGE: That didn't answer my
21 question.

22 JUDGE WISNIEWSKI: Your definition -- I'm

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1 sorry.

2 CHIEF JUDGE SLEDGE: Where in your proposed
3 regulations is there an exemption for a licensee who
4 contracts with Live365 not to pay royalties?

5 MR. OXENFORD: Well, again, respectfully,
6 Your Honor, the licensee would be Live365. It would
7 not be an independent webcaster.

8 CHIEF JUDGE SLEDGE: That's not what your
9 proposed regulations say.

10 MR. OXENFORD: And I think we're almost
11 having the broadcaster/webcaster kind of problem with
12 terms.

13 CHIEF JUDGE SLEDGE: We've been struggling
14 with you on this issue from the beginning of this
15 proceeding. And it's still -- it's still a major
16 issue.

17 JUDGE WISNIEWSKI: And I suggest that you go
18 back and take a look at your own definition of
19 aggregated webcaster, which you are now talking about
20 as some sort of ethereal service, programming service,
21 when in fact it says that they're the entity that
22 individually streams. That's what your definition

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1 says, sir.

2 MR. OXENFORD: Again, I need to look at the
3 definition. My understanding of the definition is
4 that Live365 is the service. There are webcasters who
5 may provide programming.

6 JUDGE WISNIEWSKI: That may be what you
7 intended. It's not what you accomplish in these
8 proposed regulations.

9 MR. OXENFORD: I will look at the proposed
10 regulations and answer that question in whatever reply
11 time I may have.

12 JUDGE WISNIEWSKI: Thank you.

13 JUDGE ROBERTS: I have one more question,
14 Mr. Oxenford.

15 MR. OXENFORD: Oh, I'm sorry.

16 JUDGE ROBERTS: And that, remember I said it
17 was about a term.

18 You stated in your proposed findings that
19 with respect to SoundExchange's proposal for a late
20 fee for the late reports of use, that there was no
21 authority for us to adopt that type of term.

22 We have, however, adopted a late fee for a

1 late statement of account. And that already exists in
2 the regulations. So I'm wondering if you believe that
3 that, therefore, that late fee for a late statement of
4 account, that we were without authority to adopt that
5 term as well.

6 MR. OXENFORD: My recollection of the
7 statutory language is that we're allowed -- that
8 you're allowed to adopt a late fee for a late payment.

9 I don't know where the authority would come
10 from for adopting a late statement of account. So --
11 and I hesitate to say that you've adopted a regulation
12 without authority.

13 JUDGE ROBERTS: I understand. But I just
14 wanted to know if that necessarily followed from your
15 position that we don't have authority to adopt a
16 late --

17 MR. OXENFORD: My recollection of the
18 statute, it is -- it says that you have the authority
19 for late fee -- late fees for late fees.

20 JUDGE ROBERTS: Yes. I'm looking at the
21 late payment. It says that a determination may
22 include terms with respect to late payment. And your

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1 view is that payment is only the actual money itself?

2 MR. OXENFORD: It's payment. Yes.

3 JUDGE ROBERTS: Okay. All right. Thank
4 you.

5 JUDGE WISNIEWSKI: Actually, I do have one
6 further question.

7 MR. OXENFORD: I may not have any rebuttal
8 time to respond.

9 JUDGE WISNIEWSKI: This also has to do with
10 a proposal related to the aggregation service.

11 We talked earlier about justifications for
12 having different rates in the market.

13 MR. OXENFORD: Yes.

14 JUDGE WISNIEWSKI: I guess the question that
15 presents itself is is there some particular reason why
16 the programming that's presented through this
17 aggregation service is somehow less competitive than
18 the programming that is presented by other commercial
19 webcasters, broadcasters, simulcasters and so forth?

20 MR. OXENFORD: Is less competitive?

21 JUDGE WISNIEWSKI: Is different in some
22 competitive sense.

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1 MR. OXENFORD: I mean, there is testimony in
2 the record that this aggregation service provides many
3 parties the ability to stream multiple types of music
4 that may not be the mainstream music that's most
5 valued in the market.

6 I don't believe there's any quantification
7 that's provided that these streams are less valuable
8 per se. But there certainly is testimony that we're
9 streaming some less commercial types of music that
10 would not otherwise be streamed.

11 JUDGE WISNIEWSKI: Because, essentially it
12 seems to me you're asking us to separate -- set up a
13 separate category here.

14 MR. OXENFORD: Correct.

15 JUDGE WISNIEWSKI: And it seems to me that,
16 so far as we have that in past proceedings, for
17 example, the last proceeding, that was largely done in
18 the context of price discrimination and the basis for
19 price discrimination. I don't see that here.

20 MR. OXENFORD: Well, the proposal here is
21 based principally on the acknowledged fact that it is
22 a benefit to the collective to have one service paying

1 for multiple smaller entities that otherwise may not
2 be able to meet the royalty obligations or may cause
3 some additional costs to the collective.

4 JUDGE WISNIEWSKI: But if I'm selling a
5 uniform product, the fact that some of the folks I'm
6 selling it to might be easier to deal with than
7 others, doesn't mean I'm going to change my price.
8 That's the market price.

9 MR. OXENFORD: Well, it may. It may if
10 you're able to deliver in bulk as opposed to --

11 JUDGE WISNIEWSKI: Well, that's presuming
12 I've got market power. In fact, if we are in a
13 hypothetical market and we're in competitive
14 situations, then that wouldn't be the case.

15 MR. OXENFORD: Well, actually, I think it
16 would be, though. I mean, if I was delivering widgets
17 and I could deliver my widgets to one buyer in one
18 truckload rather than to have 10 truckloads, I might
19 be able to negotiate a different rate.

20 If that buyer has one location rather than
21 100 locations around the country, so it's only going
22 to one place, I might be able to offer a lower rate.

1 If the one buyer is acting as a buying agent
2 on behalf of hundreds of coops --

3 JUDGE WISNIEWSKI: That may be true in an
4 individual situation. I don't dispute that that might
5 not be true in an individual situation.

6 MR. OXENFORD: Right.

7 JUDGE WISNIEWSKI: But here what you're
8 talking about it setting up a category that applies
9 across a whole market.

10 MR. OXENFORD: Correct. For anyone who
11 meets that -- provides that benefit to the collective.

12 JUDGE WISNIEWSKI: And if there are
13 thousands of such entities, then clearly they would
14 all have to meet that criteria?

15 MR. OXENFORD: Right. If they meet the
16 criteria that we provide and provide those benefits to
17 SoundExchange, yes, they would be entitled to that
18 discount because they provide that benefit.

19 JUDGE WISNIEWSKI: That comes back to the
20 same point that I made before. On the whole or on
21 average, is there anything that would cause us from an
22 economics point of view to price-discriminate between

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1 that category and -- that regular category of
2 commercial webcasters we have, or the category of
3 noncommercial webcasters that we have?

4 MR. OXENFORD: The -- again, the
5 justification is that it saves money to the collective
6 and to the copyright owners.

7 JUDGE WISNIEWSKI: I think we're going
8 around in circles. Thank you.

9 MR. OXENFORD: Thank you.

10 CHIEF JUDGE SLEDGE: Which portion of the
11 license -- of the 114 license would this category fit?
12 Is it a noninteractive transmission? Is it a new
13 service?

14 MR. OXENFORD: No. It's a noninteractive
15 transmission.

16 CHIEF JUDGE SLEDGE: Not claiming to be a
17 new service?

18 MR. OXENFORD: No. I mean, we are
19 essentially no different than Yahoo was in Web I, who
20 was an aggregator of many other content creators'
21 content. In Web I, Yahoo, that was deemed to be the
22 model for the statutory royalty, was an aggregator of,

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1 in fact, many broadcasts, simulcasts, and also some
2 pure webcasts.

3 CHIEF JUDGE SLEDGE: Any other questions?

4 Thank you, sir.

5 MR. OXFENFORD: Thank you.

6 CHIEF JUDGE SLEDGE: How much time is
7 remaining?

8 JUDGE ROBERTS: 10 minutes.

9 CHIEF JUDGE SLEDGE: You have 10 minutes
10 remaining.

11 Mr. Malone, for our order of presentation,
12 you were awarded the spot that everybody else wanted,
13 of being last. And now you get the additional benefit
14 of having a break and nourishment before your
15 presentation.

16 We will recess for one hour.

17 MR. MALONE: Thank you, Your Honor.

18 (Whereupon, at 12:24 p.m., the hearing was
19 recessed, to be reconvened at 1:24 p.m. this
20 same day.)

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1 AFTERNOON SESSION

2 (1:24 p.m.)

3 CHIEF JUDGE SLEDGE: As IBS is not present,
4 does CBI want to go ahead and present at this time?

5 MR. DUMAS-EYMARD: Yes, Your Honor.

6 Your Honor, my name is Aymeric Dumas-Eymard.
7 I'm appearing today on behalf of College Broadcasters,
8 Incorporated.

9 CBI has voluntarily entered into a
10 settlement agreement with SoundExchange. We believe
11 the terms of that settlement are reasonable. The
12 agreement provides for the same minimum fee that was
13 adopted by this board in Webcasting II.

14 Most significantly, it also provides for
15 the payment of a flat auditable fee in lieu of
16 recordkeeping, which assures noncommercial educational
17 webcasters, that they will not incur more than a
18 nominal additional expense beyond the minimum fee.
19 CBI therefore respectfully requests that the board
20 adopt the rates and terms of the CBI/SoundExchange
21 settlement agreement as the statutory terms and rates
22 for noncommercial educational webcasters.

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1 CBI respectfully rests on its papers, and I
2 thank Your Honors for your attention.

3 CHIEF JUDGE SLEDGE: Questions?

4 JUDGE ROBERTS: One question. Actually two,
5 I guess. Counselor, how do you pronounce your name?

6 MR. DUMAS-EYMARD: Aymeric Dumas.

7 JUDGE ROBERTS: How do you spell your last
8 name?

9 MR. DUMAS-EYMARD: It's D-U-M-A-S.

10 JUDGE ROBERTS: In your agreement you are
11 proposing a different category, something that you
12 have identified as educational, noncommercial
13 educational webcasters. Is that correct?

14 MR. DUMAS-EYMARD: That's correct, Your
15 Honor.

16 JUDGE ROBERTS: That is separate from
17 noncommercial webcasters?

18 MR. DUMAS-EYMARD: Yes, Your Honor, it is.

19 JUDGE ROBERTS: Okay. I just wanted to be
20 clear on that. Thank you.

21 CHIEF JUDGE SLEDGE: Thank you, sir.

22 MR. DUMAS-EYMARD: Thank you, Your Honor.

1 CHIEF JUDGE SLEDGE: All right, Mr. Malone.

2 I see you've come in. We'll proceed with yours.

3 CLOSING ARGUMENTS ON BEHALF OF

4 INTERCOLLEGIATE BROADCASTING SYSTEM

5 MR. MALONE: I was reminded, Your Honor, of
6 the biblical verse that says the last shall be first
7 and the first shall be last. But I don't know what
8 that makes you.

9 CHIEF JUDGE SLEDGE: I've wondered that
10 question a lot myself.

11 MR. MALONE: If Your Honors please, in my
12 opening statement to you some months ago, I said that
13 we felt a little bit left out of this. That everybody
14 seems to have a special rate to themselves and that
15 we're being put in the default position. And whether
16 or not that's true, the point is, I think, that the --
17 none of the various alternatives solves the two
18 principal problems that we have in enabling students
19 in a volunteer context, both in high schools and in
20 colleges, from, you know, experimenting with that
21 aspect of Internet operation that they can choose to
22 be exposed to.

1 And the use of music here is not a matter of
2 delivering it for a price or for a profit, but rather
3 is a -- is an instructional mechanism that enables --
4 keeps the volunteers interested and gives some purpose
5 in their volunteering, more purpose perhaps than they
6 see in an algebra class or the like.

7 The -- I think there are three principal
8 issues that I will address. And then at any point you
9 of course have the prerogative of interfering -- or
10 interrupting me.

11 I think the first place to start is with the
12 money. That is, with the rates. And the per minute
13 rate for commercial stations is one that we can live
14 with. It's the \$500 minimum rate that we can't live
15 with.

16 Now, Mr. Handzo I think pointed out that the
17 best figures we have on station income is \$9,000 a
18 year on the average. And that is of course a -- an
19 average. And that means there are, roughly speaking,
20 as many stations that have less than the average than
21 have more.

22 And the -- it's very well and good to say,

1 well, the average station can -- you know, this does
2 not divert them from their educational purpose. But
3 it doesn't say anything about the total population
4 that that averages. So we're worried particularly
5 about the college stations that have annual incomes of
6 less than that, the ones who collect nominal dues from
7 their volunteer members and try to run on that. And
8 there are others who have fundraisers of various
9 sorts, sponsoring campus bands and the like, and from
10 which they derive some profit.

11 But that's really not -- in fact my
12 experience with undergraduates is they don't worry
13 about money. I guess their parents have always done
14 that for them. So it is for them an experience in
15 having to budget and live by the budget.

16 And the -- none of the stations has the
17 ability, at least legally, to send these -- the number
18 of dollars they have to two or three different objects
19 by cloning paper currency.

20 So if, as Mr. Murphy from the University of
21 Connecticut testified, there is -- that's a point of
22 great -- I can say concern, but I think it doesn't

1 overstate it to say a point of great apprehension that
2 he runs into in the IBS national and regional
3 conventions that he has attended.

4 And I think that, you know, it's just not an
5 infinitely expansible resource. So I think the \$500
6 is disproportionate to the amount of use that the --
7 the stations make of -- of not -- well, of recorded --
8 digitally recorded music, which is not under a direct
9 license from the -- for an on-campus broadcast, for
10 instance.

11 The station has the direct permission of
12 the -- of the band to broadcast their music because
13 they value the promotional value of it. And for
14 starving artists, why, they need exposure more than
15 they need the few cents that would result from a
16 performance over a station that has an average number
17 of listeners at any given time of four.

18 And the -- the point here is simply that
19 there's just a disproportion between the small
20 volunteer operations that may operate only a few hours
21 a day, five days a week. And it's particularly a
22 stumbling block and an obstacle to their exercising

1 their abilities in this area if they're a start-up

2 where they have no money at all to speak of.

3 And a lot of stations over the past

4 60 years, 70 years, have been, you know, start-up

5 groups, that some students have gotten together and,

6 hey, fellows, there's this -- and gals, now -- there's

7 this new technical capability that we can share, you

8 know, records with various other people in our dorms

9 during certain times of the day, when we're all

10 supposed to be studying.

11 And the purpose is different. The use is

12 different. The impact is quite different.

13 And I think that the question, as I read the

14 statute, is that the -- the statute talks about types

15 of users. And I think our position has to rest in

16 part on the proposition that these small college

17 stations do not have very much in common with a

18 commercial webcaster or some of the big NPR affiliates

19 who stream, you know, not to four listeners at any

20 time, but to tens of thousands of listeners.

21 And if you look at 114(f)(2)(A) and (B)

22 and -- well, that's principally it, the -- you know,

1 Congress hasn't given us much help on the definition
2 of the word "type." But I think they're looking for
3 a -- the board to segregate different kinds of
4 operation. And I think the statute may even be read
5 as a mandatory, shall distinguish, and words to that
6 effect. Recognition of these -- these kinds, these
7 various kinds.

8 And as I say, when you begin to look at all
9 the other negotiated arrangements -- may I sit,
10 please?

11 CHIEF JUDGE SLEDGE: Yes, sir.

12 MR. MALONE: That they've -- obviously
13 SoundExchange has been chopping this up into pretty
14 fine, different categories of ratepayers or of users.

15 And I think that that may give, as a
16 practical matter, maybe a practical lead to this Court
17 as to the content in the -- in the business they're in
18 of recognizing different types of webcasters.

19 And so I think that -- I think that's about
20 the most one can get out of section 114(f)(2).

21 The --

22 JUDGE ROBERTS: Well, Mr. Malone.

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1 MR. MALONE: Yes.

2 JUDGE ROBERTS: I actually get a bit more
3 out of --

4 MR. MALONE: Okay.

5 JUDGE ROBERTS: -- section 114(f)(2)(B).

6 And that is in the statutory language itself, it does
7 say that we are to distinguish between types. But in
8 making that distinction, the statute says: "Such
9 differences to be based on criteria, including but not
10 limited to, the quantity and nature of the use of
11 sound recordings and the degree to which the use of
12 the service may substitute for or may promote the
13 purchase of phonorecords by consumers."

14 I want to look at, first, the portion that
15 says the quantity and nature of the use of sound
16 recordings.

17 MR. MALONE: All right.

18 JUDGE ROBERTS: What evidence have you put
19 into the record on this question as to the quantity
20 and use and the nature of the use of sound recordings
21 to support your request for these two different types
22 of services; namely, small commercial, noncommercial

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1 webcasters and very small noncommercial webcasters?

2 MR. MALONE: In distinguishing between those
3 two subgroups?

4 JUDGE ROBERTS: Yes.

5 MR. MALONE: All right.

6 JUDGE ROBERTS: You're asking for different
7 rates, different minimum fees -- I shouldn't say
8 rates. Different minimum fees for those two
9 categories, small noncommercial webcasters and very
10 small. And I'm asking you what evidence has been put
11 into the record on the quantity and nature of the use
12 of sound recordings as applicable to those two
13 different types of services? Since the statute says
14 we have to look at that, among other things.

15 MR. MALONE: All right. The difference
16 between the two, the small and very small, is that
17 there's ample evidence that stations who do not exceed
18 the number of performances per year for the lower rate
19 are -- that immediately segregates out everyone with a
20 bigger audience.

21 In this case, certainly the sharpest
22 contrast between this and the larger stations is that

1 four is just very, very small.

2 And the -- there are some stations that will
3 exceed the four, but not by very much. And I think
4 that's simply based on the experience of IBS's
5 officers, over the 50 years for some of them, in
6 interfacing with student bodies.

7 And the point here, I think, in, you know,
8 it's -- you know, certainly a technical objection to
9 your argument is that it's the disproportionality
10 between the \$500 rate which will, you know, get you a
11 hundred thousand performances or so, and the amount of
12 use of the music measured by the number of listeners
13 at any given time.

14 And the -- you know, the stations, as we
15 talk to them, are willing to -- willing to pay the per
16 unit rate that's set out --

17 JUDGE ROBERTS: Mr. Malone, I'm going to
18 have to interrupt you because you're not answering my
19 question.

20 My question is what evidence is there that
21 we have in the record about the quantity and the
22 nature of the use of sound recordings by these very

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1 small noncommercial webcasters and small noncommercial
2 webcasters that would enable us, as the statute says,
3 to make that type of distinction between small, very
4 small and simply noncommercial webcasters?

5 MR. MALONE: Well, Your Honor, the record
6 does not provide the modal values on this spectrum.
7 So I have to say that the argument for drawing a line
8 between the small webcasters and the very small
9 webcasters is simply the -- the amount of use. And
10 that's what the definition sets up as a hurdle to
11 getting into that category.

12 JUDGE ROBERTS: So with respect, then, to at
13 least the nature of the use of sound recordings,
14 you're acknowledging that we have nothing in the
15 record on that question?

16 MR. MALONE: I think that's true, Your
17 Honor, that we are not in a position to distinguish
18 for you stations along that spectrum.

19 JUDGE ROBERTS: Okay.

20 MR. MALONE: That fine grain.

21 JUDGE ROBERTS: Well, given that there is no
22 evidence on the nature of the use --

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1 MR. MALONE: Well --

2 JUDGE ROBERTS: -- and the statute requires
3 a consideration of that, how then can we make a
4 distinction as to the two types of services that
5 you're asking for?

6 MR. MALONE: I think it would be very
7 difficult. And one has to take into account other
8 factors.

9 JUDGE ROBERTS: Well, how can I take into
10 account other factors when the statute is telling me I
11 have to take this into account?

12 MR. MALONE: Well, I think that Congress's
13 language in that subparagraph, I guess, is pretty
14 intentionally loose to give you the -- that's almost
15 an ad hoc call in this particular area.

16 It does seem to us that it would be unfair
17 to SoundExchange not to at least pay for the minutes
18 of use that we do use. And this, I think, gets the
19 two big groups of small webcasters sorted out as a
20 practical matter.

21 You know, it's --

22 JUDGE ROBERTS: I'm going to ask this

1 question one last time. And that is that with respect
2 to the quantity and nature of the use, in particular
3 the nature of the use of sound recordings, you
4 acknowledge that there is nothing in the record to
5 tell us about the nature of the use of sound
6 recordings of very small -- the two categories that
7 you propose, very small noncommercial webcasters and
8 small noncommercial webcasters.

9 But you're telling me that I don't need to
10 make any call or determination as to the nature and
11 the use, and I still should nevertheless find that
12 these two qualify as a different type of service.

13 MR. MALONE: Differentiating between the two
14 subcategories.

15 JUDGE ROBERTS: That's your position?

16 MR. MALONE: That's right. We can
17 differentiate ourselves from the big boys.

18 JUDGE ROBERTS: Okay.

19 MR. MALONE: But I don't know of any
20 objective data that's available that would enable you
21 to differentiate between stations that are eight or
22 less or 20 or less other than the fact that, you know,

1 the drafting was done by people in the -- in the
2 college radio industry who are fairly familiar with
3 how these stations operate. And there clearly is
4 going to be a difference implied by the difference in
5 the hours of performance, because the staffing is
6 going to be very different.

7 You know, you're talking about a fairly
8 intelligent and intensive volunteer who is able to run
9 the station and get audiences up in the area of 20.
10 That's almost -- you know, I think a lot of stations
11 would be very happy to do that. And it may vary from
12 year to year because, you know, students come,
13 students go. Mr. Murphy mentioned the turnover in
14 volunteers. And that's certainly a factor.

15 And I think it's extremely difficult for a,
16 you know, a beginning staff or a small volunteer staff
17 to push their figures up in the area of 15 to 22
18 listeners.

19 JUDGE ROBERTS: But we have nothing in the
20 record on the nature of the use of sound recordings by
21 small and very small noncommercial webcasters?

22 MR. MALONE: Other than what I've offered, I

1 don't think there's evidence in the record that
2 enables you to differentiate between the two as, you
3 know, small --

4 JUDGE ROBERTS: The nature of the use.

5 MR. MALONE: Yeah.

6 JUDGE ROBERTS: All right.

7 JUDGE WISNIEWSKI: Mr. Malone, before you
8 resume, you had mentioned something that repeats some
9 information that was in your last rate proposal.

10 MR. MALONE: Yes.

11 JUDGE WISNIEWSKI: That is, in your last
12 rate proposal at page 2, under per performance rates,
13 it simply says "as proposed by SoundExchange."

14 Would you clarify for me, because based on
15 the way you've presented your case throughout, and
16 your arguments here this afternoon, it sounds like you
17 do have, in fact, a difference between SoundExchange
18 on the per performance rates.

19 If you look at SoundExchange's proposal
20 itself, for noncommercial webcasters, who make
21 transmissions of not more than 159,140, they ask for a
22 flat rate of \$500 per annum. That is separate and

1 apart from their minimum fee part of the proposal.

2 As I understand it, you're not -- you
3 wouldn't be happy with \$500.

4 MR. MALONE: Our smaller stations cannot
5 live with that.

6 JUDGE WISNIEWSKI: So, in fact, it's not
7 just the minimum fee that you'd like to be these
8 numbers. It is also the fee they would pay under the
9 per performance rate?

10 MR. MALONE: What --

11 JUDGE WISNIEWSKI: Or am I missing
12 something?

13 MR. MALONE: No. I think what we're
14 prepared to do is pay the per performance rate. But
15 we aren't prepared to pay for the thousands of
16 performances that we would be paying for and not
17 getting in the hands of listeners.

18 JUDGE WISNIEWSKI: So you would take the per
19 performance rate that is in the SoundExchange
20 proposal --

21 MR. MALONE: For the overage.

22 JUDGE WISNIEWSKI: For the over amount, and

1 pay that irrespective of the ATH that you broadcast;
2 is that correct?

3 MR. MALONE: Well, as long as you stayed in
4 the same category.

5 JUDGE WISNIEWSKI: In the 159,000 category.

6 MR. MALONE: That's correct, Your Honor. In
7 other words, you know, the numbers of listeners that
8 we're talking about here is just not a barrier to
9 entry as the \$500 is a barrier to entry.

10 JUDGE WISNIEWSKI: I thought that's what you
11 were talking about. It's not clear from your
12 proposal.

13 MR. MALONE: Thank you for giving me the
14 opportunity to make it clear.

15 Now, there's another barrier to entry here
16 which is adverted to by a couple of our witnesses, and
17 that is the recordkeeping. Mr. Murphy says there are
18 just a lot of stations that are not automated and
19 don't -- being automated would deprive them of their
20 educational ability.

21 So that if you institute a recordkeeping
22 requirement that requires automation, then you're

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1 changing one of the fundamental aspects of the college
2 radio volunteer-type operation. And, again, there's
3 precedent to look for. And that's in the
4 CBI/SoundExchange agreement, which gives three
5 alternatives as to the recordkeeping and reporting.
6 And that threefold alternative would be, I think in
7 the views of our station managers and station staff,
8 would be a -- an ideal sort of choice to be put to.

9 The feeling is that \$100 is not as much a
10 barrier to entry as \$500. And there are cost-free, I
11 guess -- well, strike cost-free. There are price-free
12 alternatives there in terms of also the sampling
13 recordkeeping, and then of course the census reporting
14 which is -- you know, that's just something that some
15 of our stations lack the technical ability and the
16 staffing ability to do.

17 I mean, if -- and so I think that, again, if
18 we could get the \$500 obstacle taken care of one way
19 or another, that the -- and have the same choice as
20 SoundExchange has given the larger stations in the --
21 under the CBI agreement, that would substantially
22 solve that obstacle to small station participation.

1 And, you know, I don't think that --

2 JUDGE ROBERTS: So to be clear on that,
3 Mr. Malone, then your stations would be willing to pay
4 the \$100 fee in lieu of having to submit the reports?

5 MR. MALONE: I think all but the very
6 smallest would be able to. Those may not come up on
7 the radar.

8 The -- I guess the next issue that I would
9 like to address is the joint motion of SoundExchange
10 and CBI to have the board adopt the rates in that
11 agreement for a default position.

12 And the -- this is a very peculiar vision in
13 the sense that it doesn't mean anything to CBI. They
14 think that the agreement itself will take care of
15 their stations' problems. And I think that's probably
16 quite so, given the profile of their membership.

17 The -- but I don't think that -- over and
18 beyond that, I don't think that all the statutory
19 prerequisites have been met for the board's acting
20 favorably on their motion.

21 First of all, you know, IBS is objecting.
22 And certainly at this end of the station spectrum, we

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1 represent the majority of the small stations. And so
2 the board is simply rejecting the -- not adopting the
3 interests of the -- of a substantial, presumably a
4 majority part of the college radio segment.

5 And the -- also, it's not clear to me
6 that -- you know, they bring in support from 24
7 letters to the board, which they assembled. And this,
8 I think, goes to the same point that the question to
9 me at the closing of that day's -- or at least the
10 closing of one of the hearings. And that is, we
11 didn't ask for it. We thought that, first of all, the
12 judges here are sitting in sort of a mixed
13 adjudicative, rule-making posture. And I don't think,
14 you know, this is the kind of evidence that goes into
15 the Court's decision as to whether they should proceed
16 to consider that it's adopted.

17 The statute writer has very carefully
18 divided that into two different segments, little i and
19 little ii. And the first, it's when the petition hits
20 your -- your doorstep, the -- there can be written
21 submissions from the public, if you will, as to
22 whether the board ought to consider the motion in an

1 adjudicative context, that is in the hearing.

2 And the second provision says that, you
3 know, only -- only objector -- only parties can file
4 objections, which certainly are a higher status on the
5 evidence tree than just comments by nonparties.

6 So that we don't think that what we have in
7 those 24 letters is persuasive.

8 The -- nor I suggest can the -- I think the
9 first step, that is, of getting the judges to consider
10 the motion, has been taken. And certainly the letter
11 writers have no objection to that.

12 Then when we move to the second phase, I
13 don't think they have any standing to object if they
14 aren't parties.

15 So, you know, this is either a careless
16 draftsman or one who's got a very precise sense of
17 what the various words are intended to mean in this
18 statute.

19 And we don't think that -- we don't think
20 that either the movant, one of the co-movants or
21 the -- you know, I just don't think that CBI -- it
22 gets them nothing to have the rate adopted. They've

1 already gotten to their rate guaranteed by publication
2 in the Federal Register as a result of the filing
3 agreement. And extending it to other parties at
4 large, or other operations at large doesn't -- it's no
5 skin off their nose either way.

6 Now, the -- well, I think I've intimated
7 before my views as to why the agreement was set up and
8 has the provision of making it not subject to the
9 nondisclosure requirements.

10 JUDGE ROBERTS: Mr. Malone --

11 MR. MALONE: Yes.

12 JUDGE ROBERTS: -- are you still objecting
13 to the adoption of the CBI agreement?

14 MR. MALONE: Well, the -- if that --
15 that's -- in a sense, that's no skin off of the bigger
16 IBS members' noses. But to the smaller --

17 JUDGE ROBERTS: I'm asking you. When we
18 published it, you filed an objection.

19 MR. MALONE: We did.

20 JUDGE ROBERTS: Are you still standing by
21 that objection?

22 MR. MALONE: We are still standing by the

1 record that we have made to date.

2 JUDGE ROBERTS: Are you still standing by
3 your objection?

4 MR. MALONE: Well, if you're -- if you're
5 asking by --

6 JUDGE ROBERTS: I'm asking you if you object
7 to the adoption of the CBI agreement?

8 MR. MALONE: We do object to the secondary
9 effects in terms --

10 JUDGE ROBERTS: Do you object to the -- I
11 don't know how I can ask this plainer? Do you object
12 to the agreement? You filed an objection with us.
13 I'm asking you, do you still object?

14 MR. MALONE: We object because it excludes
15 us by the \$500 minimum.

16 JUDGE ROBERTS: Okay. I don't understand
17 that. And here is why I don't understand that. The
18 CBI agreement asks for the delineation of a category
19 identified as noncommercial educational webcasters and
20 provides a definition for that and sets forth that the
21 \$500 fee is to apply to a noncommercial educational
22 webcaster.

1 In your case, you have proposed for us to
2 adopt two new types of services.

3 MR. MALONE: Yes, Your Honor.

4 JUDGE ROBERTS: The small noncommercial
5 webcaster and the very small noncommercial webcaster.

6 MR. MALONE: That's right.

7 JUDGE ROBERTS: What interest of it is
8 your -- is it of you to object to an adoption of
9 noncommercial educational webcaster when you're
10 proposing two different -- completely different
11 services?

12 MR. MALONE: Well --

13 JUDGE ROBERTS: You're not proposing a rate
14 for noncommercial educational webcasters. Only CBI
15 and SoundExchange are.

16 MR. MALONE: Right.

17 JUDGE ROBERTS: So why are you objecting to
18 our adoption of that if you have a -- two separate
19 categories that you want adopted?

20 MR. MALONE: Well, the judges can certainly
21 say that -- I mean, there's nothing incompatible with
22 them. The --

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1 JUDGE ROBERTS: But I'm asking you why are
2 you still objecting to the adoption of a \$500 minimum
3 fee for noncommercial educational webcasters when you
4 have proposed new fees for two new types of services
5 and have not proposed a fee for something called a
6 noncommercial educational webcaster?

7 MR. MALONE: Well, our --

8 JUDGE ROBERTS: Where is your dog in that
9 fight? I don't see it.

10 MR. MALONE: All right. The dog in that
11 fight is -- and, again, excluding indirect effects
12 that I understand to be the context of your question.

13 We have no objection to the terms that are
14 there as long as they don't apply to our small
15 stations.

16 JUDGE ROBERTS: So you're just objecting to
17 it on the theory that you just hope that what's ever
18 in there doesn't somehow get applied to your case,
19 even though you're asking for two completely different
20 services?

21 MR. MALONE: That's essentially correct,
22 Your Honor.

1 JUDGE ROBERTS: All right.

2 MR. MALONE: I think the -- I think that
3 basically hits the points of our case that might cause
4 some of the most question. And I think, at this
5 point, I will simply complete my remarks with the
6 request that we have a clear path for these stations
7 to operate without having to undergo restructuring of
8 their academic or their educational program, and,
9 again, at a price and with ancillary recordkeeping
10 requirements that they can live with.

11 CHIEF JUDGE SLEDGE: Thank you.

12 Mr. Handzo, any further argument?

13 REBUTTAL CLOSING ARGUMENTS OF SOUNDEXCHANGE, INC.

14 MR. HANDZO: Briefly, Your Honor.

15 Just two points, if I may. First of all, I
16 wanted to respond to Judge Roberts' question about our
17 interpretation of the Webcaster Settlement Act and
18 whether there was legislative history that we were
19 referring to.

20 And the answer is, no, we were referring to
21 the text of the statute itself, which we think
22 supports that interpretation. But there isn't some

1 additional legislative history that we hadn't cited
2 you to.

3 JUDGE ROBERTS: Okay.

4 MR. HANDZO: The second point was in
5 response to Mr. Oxenford's argument about Dr. Fratrik,
6 that all of the mistakes that he made favored
7 SoundExchange. That's really actually not true.

8 For example, he has this assumption of a
9 20 percent operating return which is, in our view,
10 clearly a mistake, and certainly not one that favors
11 SoundExchange.

12 But the broader point is that if you correct
13 those mistakes that allegedly were made in favor of
14 SoundExchange, what you wind up getting is a
15 nonsensical result, a result where the sellers have to
16 pay the buyers to use the market.

17 So all it shows, if you do that correction,
18 is that his model makes no sense.

19 And then I think I'll just end where
20 Mr. Oxenford began, which is citation to "The Dark
21 Arts of Mathematical Deception."

22 I probably don't need to argue at length to

1 the Court that I don't know enough math to practice
2 the dark arts of mathematical deception. I think that
3 SoundExchange's evidence is straightforward. And we
4 would ask the Court to adopt our rate proposal and
5 terms.

6 Thank you.

7 JUDGE WISNIEWSKI: Mr. Handzo, before you
8 go, just a quick question. Do you happen to have your
9 rate proposal before you?

10 MR. HANDZO: Someone in this room has to
11 have it.

12 I do now.

13 JUDGE WISNIEWSKI: Just as a matter of
14 clarification. On page 12 of your rate proposal,
15 under minimum fee.

16 MR. HANDZO: Yes.

17 JUDGE WISNIEWSKI: Paragraph 1 relates to
18 commercial webcasters. Paragraph 2 to noncommercial
19 webcasters.

20 MR. HANDZO: Right.

21 JUDGE WISNIEWSKI: It looks to me like
22 whoever drafted this did a cut and paste with the very

1 last sentence that's changed, last full sentence
2 that's changed there, and still references commercial
3 webcasters under the noncommercial webcasters
4 paragraph.

5 Am I correct in assuming that that's an
6 error?

7 MR. HANDZO: I'm not seeing that.

8 JUDGE WISNIEWSKI: I'm looking at the
9 sentence that reads: "For each such commercial
10 webcaster, the annual minimum fee described in this
11 paragraph shall constitute the minimum fees due under
12 both 17 USC 112(e)(4) and 114(f)(2)(B)."

13 MR. HANDZO: Yes. I think the answer is
14 that was a mistake. It was actually corrected. We
15 submitted a corrected version on July 14th, I believe.

16 JUDGE WISNIEWSKI: Okay.

17 MR. HANDZO: We'll make sure you have that.

18 JUDGE WISNIEWSKI: Well, as long as you tell
19 me. It's a small thing. But I just want to make sure
20 I understand what you're asking for.

21 MR. HANDZO: Thank you.

22 CHIEF JUDGE SLEDGE: Mr. Oxenford.

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1 REBUTTAL CLOSING ARGUMENTS ON BEHALF OF LIVE365, INC.

2 MR. OXENFORD: Thank you. You didn't give
3 me a lot to reply to.

4 Judge Wisniewski, let me see if I can
5 explain the question that you had about the
6 aggregator.

7 The definition of licensee in the proposed
8 regulations talks about a licensee is a person that's
9 obtained a statutory license to make eligible
10 nonsubscription transmissions or noninteractive
11 digital transmissions as part of a new subscription
12 service.

13 In the statute an eligible nonsubscription
14 transmission is a noninteractive, nonsubscription
15 digital audio transmission not exempt under (d)(1)
16 that is made as part of a service that provides audio
17 programming.

18 Our definition of a webcast aggregation
19 service is a streaming service that provides a network
20 of 100 independent aggregated webcasters. The
21 aggregation -- the definition of aggregated webcasters
22 is an individual, business, organization or other

1 entity that streams less than 100,000 ATH of
2 royalty-bearing performances and utilizes a webcast
3 aggregation service.

4 So the service that's providing the
5 nonsubscription transmissions is the licensee who is
6 paying the royalty.

7 The aggregated webcasters are not themselves
8 services.

9 JUDGE WISNIEWSKI: So under your
10 interpretation of the regs as they currently stand, or
11 as you propose them, one would always have to be a
12 service to be a webcaster for our purposes?

13 MR. OXENFORD: To be paying the royalty
14 rates that we're establishing, that's correct. You
15 would have to be a service. And in fact, I believe
16 that's in 114(f)(2)(A), says that this proceeding is
17 to determine reasonable rates and terms of royalty
18 payments for public performances of sound recordings
19 by means of eligible nonsubscription transmission
20 services.

21 Again, you've got to be a service.

22 JUDGE WISNIEWSKI: And how are the said

1 services defined?

2 MR. OXENFORD: Well, the word "service" is
3 not itself defined. But the only reference to a
4 service in connection with an aggregation is in
5 connection with the aggregation -- webcast aggregation
6 service --

7 JUDGE WISNIEWSKI: But there are surely
8 individual webcasters out there, right?

9 MR. OXENFORD: Sure.

10 JUDGE WISNIEWSKI: So they're regarded as
11 services for purposes of the act under your theory
12 here.

13 MR. OXENFORD: Right. But they are not
14 aggregated webcasters under the definition provided
15 here unless they use a service, the one that's
16 actually streaming, an aggregation service that's
17 actually streaming.

18 JUDGE WISNIEWSKI: So you're saying that,
19 under your definition in B, it is the second half of
20 the sentence that satisfies the condition that you are
21 seeking to obtain here?

22 MR. OXENFORD: I'm sorry. B? Which B?

1 JUDGE WISNIEWSKI: Your definition of
2 aggregated webcasters that you were just referring to.
3 It's the "and" portion. "And utilizes a webcast
4 aggregation service" --

5 MR. OXENFORD: Correct.

6 JUDGE WISNIEWSKI: -- that makes this
7 different.

8 MR. OXENFORD: That's correct.

9 JUDGE WISNIEWSKI: And without that, then
10 that would not be the case?

11 MR. OXENFORD: If you and I were out there
12 not using a webcast aggregation service, if I was out
13 there just streaming my own service, I would be a
14 service.

15 If I stream it through a webcast aggregation
16 service, I am not the service. The aggregation
17 service is the service.

18 JUDGE ROBERTS: I have to say, Mr. Oxenford,
19 I'm still confused based on the language you're
20 offering here, proposed regulatory language. Because
21 you have a definition of a commercial webcaster, and
22 you identify that person as the licensee.

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1 Now, throughout your proposed findings, and,
2 indeed, throughout this case, you've talked, and your
3 witnesses have talked, about Live365 and all the
4 webcasters that Live365 has on the service.

5 Now, if we -- if this language says that a
6 commercial webcaster is a licensee, then we're talking
7 about -- who are we talking about here? Are we
8 talking about just Live365? Or are we talking about
9 all those on the Live365 service that have been
10 identified throughout this proceeding as webcasters?

11 MR. OXENFORD: We are talking about Live365,
12 who is the service that makes the eligible digital
13 audio transmissions. It's the one that's actually
14 making the transmissions.

15 JUDGE ROBERTS: So Live365, then, in the way
16 that you have set this regulatory language up, is --
17 must be then, I guess, both the commercial webcaster
18 and the aggregation -- aggregated webcasting service.

19 MR. OXENFORD: Correct.

20 JUDGE ROBERTS: Well, I pity the person in
21 the public that looks at this and tries to figure out
22 that, indeed, that is the setup here, again,

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1 particularly when your proposed findings and your
2 witnesses have been talking about all the webcasters
3 that are present on the Live365 service. Because
4 they're not webcasters, at least not according to
5 this.

6 MR. OXENFORD: They are aggregated
7 webcasters --

8 JUDGE ROBERTS: No, they are not.

9 MR. OXENFORD: -- under the definition.

10 JUDGE ROBERTS: Not according to this
11 definition, they are not. Because the word
12 "webcaster," "commercial webcaster" in your definition
13 says that's the licensee. And those people are not
14 the licensee. Live365 is the licensee.

15 MR. OXENFORD: Because those people are not
16 the ones that are making the digital audio
17 transmission.

18 JUDGE ROBERTS: Fair enough. But I don't
19 understand why, through this proceeding, we've been
20 talking about webcasters on the Live365 service when
21 they are not the licensee. Why weren't you talking
22 about channels? That we just have 6,000 channels?

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1 MR. OXENFORD: Perhaps we should have used
2 the words "channels" or "programmers" or something
3 else as opposed to "webcasters." And I apologize for
4 the confusion.

5 JUDGE ROBERTS: Even your proposed findings
6 are talking about the webcasters present on the
7 Live365 platform, or service as you identify it. But
8 that's not accurate. Because they're not the
9 licensee.

10 MR. OXENFORD: That's correct.

11 CHIEF JUDGE SLEDGE: The transcript will
12 show that this morning you said that Live365 pays the
13 license for the webcasters.

14 MR. OXENFORD: For the aggregated
15 webcasters. That's correct.

16 CHIEF JUDGE SLEDGE: Now you're saying that
17 that's not true. That they don't pay any royalties?
18 That they don't owe any royalties? That they're not a
19 licensee?

20 MR. OXENFORD: Live365 is the licensee who
21 pays for the aggregated webcasters.

22 CHIEF JUDGE SLEDGE: And you said -- which

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1 is different than what you told us this morning?

2 MR. OXENFORD: I don't believe it's
3 different. If I did --

4 CHIEF JUDGE SLEDGE: Let me say it again.
5 This morning you said that Live365 pays the royalties
6 for the licensee.

7 MR. OXENFORD: If I said that, Your Honor, I
8 misspoke. Because Live365 is --

9 CHIEF JUDGE SLEDGE: That's what you've been
10 saying this whole proceeding.

11 MR. OXENFORD: Live365 is the licensee. And
12 it's paying for those who utilize the webcast
13 aggregation service.

14 CHIEF JUDGE SLEDGE: Even the evidence --
15 the documents that you put into evidence in this
16 proceeding that are your offerings from your Web site
17 include a provision that you can sign up under one
18 program, and Live365 will pay your license.

19 MR. OXENFORD: Correct.

20 CHIEF JUDGE SLEDGE: And now you're saying
21 that's not the case at all. That Live365 is the
22 licensee.

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1 MR. OXENFORD: Live365 is the licensee.
2 Live365 is the license -- is recognized by
3 SoundExchange, has been recognized by SoundExchange as
4 the licensee.

5 What we say to -- in our commercial
6 statements on our Web site that's been offered into
7 evidence, I believe actually by SoundExchange,
8 that's -- that's not what we're saying legally. When
9 we're saying that we're paying their license fees,
10 we're paying the license fees that a webcaster who
11 chooses to use our service, who becomes an aggregated
12 webcaster under the terms that we've suggested here,
13 we are the licensee who is paying the service.
14 Live365 is the licensee who is paying the service.

15 JUDGE ROBERTS: Again, I have to point to
16 the fact that your witnesses consistently went on
17 talking about the webcasters that were on your service
18 and that we pay for those webcasters for their
19 licenses. And they can elect not to have us pay for
20 them if they want to step out of it. But we're paying
21 the licenses.

22 And there's only one license that's being

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1 talked about here.

2 MR. OXENFORD: We are paying the licenses
3 for the services that choose to be part of our
4 aggregation service. We are the licensee for those
5 services.

6 People can use the other part of the Live365
7 platform that we've heard so much about to transmit --
8 to do the technical transmission, just like they can
9 go out and hire a third-party company to do the
10 transmission and pay their own royalties and be their
11 own licensee.

12 What we are talking about here are the
13 services that choose to become part of the Live365
14 aggregation service, where we are the ones that are
15 the licensee --

16 JUDGE WISNIEWSKI: Well, now you just used
17 the word services twice there again. That goes back
18 to what -- conflicts with what you told me, that they
19 are not services.

20 MR. OXENFORD: Okay. I apologize. We are
21 the ones that are providing. We are the service that
22 is the licensee that is streaming for these other

1 webcasters who are essentially providing us the
2 programming that is then streamed to the public.

3 And we are the licensee in that case.

4 JUDGE ROBERTS: And you believe that
5 somebody looking at this regulatory language would be
6 able to figure out, if they were an aggregator, that,
7 oh, yes, I'm the service, I am the commercial
8 webcaster, and I'm also the aggregation webcasting
9 service? I'm both?

10 MR. OXENFORD: I'd have to say that there
11 are a lot of ambiguities in this statute. And the
12 rules that the general public might not --

13 JUDGE ROBERTS: We can't do anything about
14 the statute. But we can certainly do something about
15 the regulations --

16 MR. OXENFORD: Right.

17 JUDGE ROBERTS: -- since they're our
18 regulations.

19 Again, I ask you, would that be evident to
20 somebody who went and looked at the regulatory
21 language that you're proposing here as an attachment
22 to your proposed findings, that, yes, I understand

1 that if I'm an aggregation service, I am both these
2 entities?

3 MR. OXENFORD: Well, Your Honor, if it's not
4 clear, I believe you've got the ability to substitute
5 language that makes it clear. I've told you --

6 JUDGE ROBERTS: Apparently that's what's
7 going to have to be done.

8 MR. OXENFORD: Right. And it may be just by
9 including in the language of the definition of a
10 webcast aggregation service the word "licensee." It
11 is a licensee who does this.

12 JUDGE ROBERTS: All right.

13 CHIEF JUDGE SLEDGE: Anything else?

14 MR. OXENFORD: Thank you.

15 CHIEF JUDGE SLEDGE: Thank you.

16 Anything further? All right. That
17 completes our closing arguments. The closing
18 arguments are the last phase of the -- of the
19 proceeding. The only remaining part is for the
20 determination. And that is what we will begin to
21 undertake based on the record you have provided us,
22 the arguments made, and the submissions made.

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1 We stand adjourned.

2 (Whereupon, at 2:21 p.m., the hearing was
3 concluded.)

4 * * * * *

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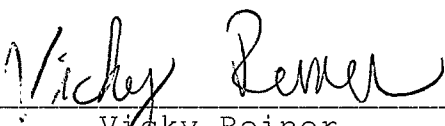
1 C E R T I F I C A T E

2 I, Vicky Reiner, RMR, CRR, and Notary Public
3 for the District of Columbia, duly commissioned and
4 qualified, do hereby certify that the proceedings in
5 the cause aforesaid was taken down by me in stenotype
6 and subsequently transcribed into English text, and
7 that the foregoing is a true and accurate transcript
8 of the proceedings so held.

9 I do hereby certify that the proceedings
10 were taken at the time and place as specified in the
11 foregoing caption.

12 I do hereby further certify that I am in no
13 way interested in the outcome of this action.

14 In witness whereof, I have hereunto signed
15 my name this 13th day of October, 2010.

16
17 
18 Vicky Reiner
19 Notary Public in and for the
District of Columbia

20 My Commission expires:
21 September 30, 2012
22

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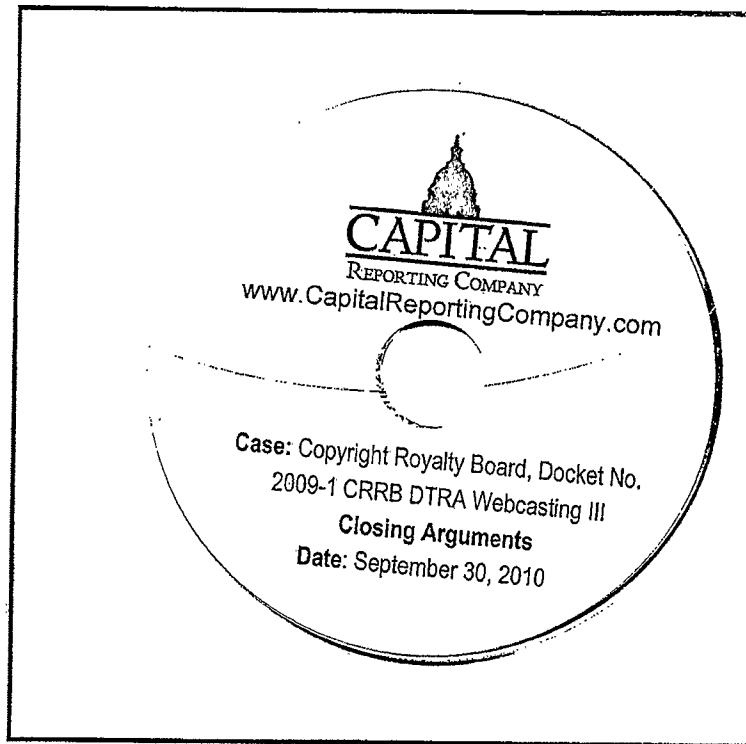
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